FILE COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1952

No. 366

UNITED STATES OF AMERICA, EX REL. JOSEPH ACCARDI, PETITIONER,

vs.

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE, NEW YORK DISTRICT, DEPARTMENT OF JUSTICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

FILED SEPTEMBER 23, 1952

CERTIORARI GRANTED NOVEMBER 10, 1952

SUPREME COURT OF THE UNITED STATES

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

BLEED THROUGH-

[fol. 1]

IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, ex rel., JOSEPH ACCARDI, Relator-Appellant,

against

EDWARD J. SHAUGHNESSY, District Director of the Immigration and Naturalization Service, New York District, Department of Justice, Respondent-Appellee

STATEMENT UNDER RULE 15b

This is an appeal from an order of the Honorable John W. Clancy, United States District Judge, entered on May 16, 1953, denying the petition for a writ of habeas corpus herein.

Oral argument by counsel for the respective parties herein was presented in open court on May 16, 1953. No testimony was taken on the allegations of the petition. This appeal from the aforesaid order was taken on May 16, 1953.

There has been no change of parties or attorneys.

[fol. 2] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, ex rel., JOSEPH ACCARDI, Relator,

against

EDWARD J. SHAUGHNESSY, District Director of the Immigration and Naturalization Service, New York District, Department of Justice

WRIT OF HABEAS CORPUS REFUSED—May 16, 1953

THE PRESIDENT OF THE UNITED STATES

to

EDWARD J. SHAUGHNESSY, District Director of the Immigration and Naturalization Service, New York District, Department of Justice

We command that you have the body of Joseph Accardi, by you imprisoned and detained, as it is said, together with

the time and cause of such imprisonment and detention, by whatever name it shall be called or charged before the District Court of the United States, in and for the Southern District of New York, at a stated term thereof, to be held at Room 506, United States Courthouse, Foley Square, Borough of Manhattan, City of New York on the 21st day of May, 1953, at 10:00 o'clock in the forenoon of that day [fol. 3] or as soon thereafter as counsel can be heard, to do and receive what shall then and there be considered concerning the said relator, Joseph Accardi, and have you then and there this writ.

Witness, the Hon. John C. Knox, Chief Judge, United States District Court for the Southern District of New York.

———— ————, Clerk of the United

—— ——, Clerk of the United States District Court for the Southern District of New York.

The foregoing writ is hereby allowed this day of May, 1953.

—— ——, United States District Judge.

Memo endorsed "This writ is refused."

John W. Clancy, U.S.D.J., 5/16/53.

IN UNITED STATES DISTRICT COURT

PETITION FOR WRIT OF HABEAS CORPUS—May 15, 1953

The petition of Joan Accardi respectfully shows:

1. I am the wife of Joseph Accardi, the relator herein, who is presently being imprisoned and detained within the [fol. 4] Southern District of New York by Edward J. Shaughnessy, District Director of the Immigration and Naturalization Service of the New York District.

2. My husband, Joseph Accardi, is a native and citizen of Italy, 42 years of age.

3. My husband, Joseph Accardi, last entered the United States during August, 1932, and has remained here ever since.

4. On April 3, 1953, the Board of Immigration Appeals affirmed an order of deportation against my husband upon

the ground that he entered the United States in 1932 without an immigration visa.

5. The Board of Immigration Appeals refused to exercise favorable discretion to permit my husband to remain here in the United States as a permanent resident.

6. My husband has been living in the United States for a period of twenty-one years. He is lawfully married to me; and I am a lawful resident of the United States. We have an American born child who was born to us in 1951.

7. My husband has been a person of good moral character for the past ten years and during this period has not been in conflict with the law.

8. In all similar cases the Board of Immigration Appeals has exercised favorable discretion and its refusal to do so [fol. 5] herein constitutes an abuse of discretion.

9. That on April 6, 1945, favorable discretionary relief was exercised herein in the form of voluntary departure and preexamination, but my husband was unable to take advantage of this because the American Consul refused to issue a visa to him on the ground that he had been convicted of a crime in 1934.

10. That the aforesaid criminal ground may be waived by the Board of Immigration Appeals and in all similar cases has been waived by the Board of Immigration Appeals.

11. Upon information and belief that the Department of Justice maintains a confidential file with respect to my husband.

12. Upon information and belief that on or about October 2, 1952, the Attorney General announced at a press conference that he planned to deport certain so-called "unsavory characters."

13. That upon information and belief, on or about October 2, 1952, the Attorney General prepared a list of one hundred individuals whose deportation he sought in accordance with the announcement made at his press conference of October 2, 1952.

14. Upon information and belief, that included in this list of one hundred persons was the name of my husband, Joseph Accardi.

[fol. 6] 15. Upon information and belief, that the aforesaid list of one hundred individuals, including the name of my husband, was circulated by the Department of Justice

among all its employees connected with the Immigration Service and the Board of Immigation Appeals.

16. Upon information and belief, that because of the listing of my husband's name on this confidential list and because of consideration of matters outside the record of his immigration hearing, discretionary relief has been denied to permit my husband to adjust his immigration status to that of a permanent resident.

17. That application was made during the month of May, 1953, for reconsideration of my husband's case and such reconsideration has resulted in a reaffirmance of the order of deportation herein.

18. Upon information and belief that the Attorney General has issued several press releases with regard to my husband's case during the month of April, 1953, and because of the unfavorable publicity accorded to this case at the instigation of the Attorney General, it has not been possible to secure a fair reconsideration and rehearing of this matter.

19. That the decision to deny favorable discretionary relief herein was pre-judged by the Attorney General on [fol. 7] October 2, 1952, when he included my husband's name in the list of one hundred so-called "unsavory characters" and since that time it has been impossible for my husband to secure fair consideration of his case.

20. That the present Attorney General has continued the policies and practices of his predecessor with reference to my husband's case.

21. That the deportation order entered herein and the order denying favorable discretionary relief is null and void, violates due process, and should be set aside.

22. That no previous application for the relief prayed for herein has been made to any court or judge thereof except that a previous writ was issued on April 22nd, 1953, and was denied after hearing by Judge Noonan.

23. That the previous writ did not set forth any of the facts herein concerning the prejudgment of the case, the use of confidential material in violation of law and the unfavorable publicity and lack of due process as alleged herein.

24. That in view of these entirely new allegations which

are set forth herein it is believed that the instant writ should issue.

Wherefore it is respectfully prayed that the within writ of habeas corpus be allowed.

[fol. 8] Dated, New York, May 15, 1953.

(S.) Joan Accardi.

Duly sworn to by Joan Accardi; jurat omitted in printing.

[fol. 9] In United States District Court

Opposing Affidavit

State of New York,
County of New York,
Southern District of New York, ss:

William J. Sexton, being duly sworn, deposes and says:

I am an Assistant United States Attorney in the office of J. Edward Lumbard, United States Attorney for the Southern District of New York and, as such, I am in charge of and am familiar with the above captioned proceeding.

This affidavit is made in opposition to petitioner's application for the issuance of a writ of habeas corpus herein. This affidavit is based upon the records of the Immigration and Naturalization Service which are incorporated herein by reference with the same effect as if set forth herein in full.

The relator herein, in whose behalf a writ of habeas corpus is sought, previously sued out a writ of habeas corpus in this Court under Civil No. 84-269. A return to that writ of habeas corpus dated April 24, 1953, was duly filed and the same came on to be heard before the Honorable Gregory F. Noonan, United States District Judge. On April 30, 1953, Judge Noonan dismissed the writ of habeas [fol. 10] corpus by a memorandum opinion endorsed on the record. On May 5, 1953, a formal order dismissing the prior writ was duly made and entered in this Court. A copy of the respondent's return to the previous writ of habeas corpus, the memorandum decision of the Court and the order dismissing the writ of habeas corpus have been

attached to the administrative record and are likewise incorporated herein by reference.

Since the dismissal of the aforesaid writ of habeas corpus there has been no change of facts or circumstances except that the relator made a motion to the Board of Immigration Appeals for reconsideration of his case and on May 8, 1953, that motion was administratively denied. In effect, relator now seeks to raise the same issue which he sought to raise in the prior writ of habeas corpus proceeding. He now again challenges the propriety of the denial of his administrative application for a "pardon" from deportation in the form of suspension of deportation. The present petition for the issuance of a new writ of habeas corpus merely attempts to raise some additional arguments which were fully available to the relator in the prior proceeding, but which, for reasons not now explained, he did not urge in the prior proceeding. The principal ground for opposing the allowance of the present writ of habeas corpus is based upon the contention that controlling weight should be given [fol. 11] to the dismissal of a prior writ of habeas corpus based on substantially the same issue. *United States ex rel. Karpathiou* v. *Jordan*, 153 F. 2d 810, cert. den. 328 U. S. 868, rehearing denied 329 U. S. 821; *Wong Doo* v. *United States*, 293 F. 273, which affirmed *Wong Sun* v. *Fluckey*, 283 F. 989.

The Immigration and Naturalization records clearly and unequivocally show that the final decision denying discretionary relief to the relator was based on the record of his case and on the numerous unfavorable factors appearing therein. There is no substance to the relator's pretended claim that the decision was based on information outside of the record. Nor does the fact that this case has received some small degree of publicity have any bearing upon the merits or issues in the deportation proceedings. As a matter of fact the initial administrative decisions adverse to the relator were made long before any publicity of any kind was connected with this case. Finally, it is emphatically denied that the Board of Immigration Appeals has uniformally granted discretionary relief to aliens similarly situated. It has always been the practice of that Board to consider the individual merits of every case and the unfavorable factors considered in this case are

unique to the particular case. In any event, the decision [fol. 12] of the Board, on the merits, as an exercise of discretion is not subject to judicial review and intervention, as has already been held by the decision of Judge Noonan on the prior writ of habeas corpus.

The relator's contention that the merits of his case were pre-judged by the administrative authorities is equally frivolous, since he conceded the facts upon which the order and warrant for deportation were based and raised no defense to the deportation charge. The only issue in the entire proceeding was the question of whether the case was sufficiently meritorious to warrant the extraordinary form of discretionary relief, suspension of deportation. An administrative "pardon" from deportation is a matter of grace; it is a privilege which is not surrounded by the usual requirements of due process of law. It is an area of administrative action over which the courts have no power of review. *United States ex rel. Kaloudis* v. *Shaughnessy,* 180 F. 2d 489, and cases cited therein.

Finally, it should be pointed out to this Court that both the first writ of habeas corpus and the present application for a second writ are entirely dilatory, presenting no issue of substance and even brought for the sole purpose of delay. What is significant is the fact that the first writ of habeas corpus was sued out on the eve of the relator's sched- [fol. 13] uled departure which was interrupted by the allowance of such writ. Now, relator and his attorney have been advised for several weeks that he was scheduled to be deported on the sailing of the SS Roma on May 19, 1953. Obviously, he is now seeking a second writ of habeas corpus and requests that the same be made returnable on May 21, 1953, with the design that he will thereby again interrupt his scheduled deportation.

All litigation must come to an end. The deportation proceedings herein have been pending since October 31, 1947. For almost six years the Government has been seeking to deport this relator who is admittedly in the United States illegally and who concededly has no defense to the deportation charge. Having reached the final stage he now again seeks to evade deportation by a multiplicity of litigation to which this Court should not lend itself by allowing another writ of habeas corpus.

Wherefore, it is respectfuly prayed that the petition for the issuance of a writ of habeas corpus herein be disallowed in all respects.

(S.) William J. Sexton.

Sworn to before me this 15th day of May, 1953. (S.) Julius Rolnitzky, Notary Public, State of New York, No. 41-3334300.

[fol. 14] In United States District Court

[Title omitted]

Transcript of Hearing

Before Hon. John W. Clancy, District Judge

New York,
May 16, 1953,
10:00 o'clock a. m.

Appearances

Jack Wasserman, Esq., Attorney for Relator.

J. Edward Lumbard, Esq., United States Attorney, for the Respondent, by William J. Sexton, Esq., and Nathan Skolnik, Esq., Assistant United States Attorneys.

Lester Friedman, Esq., Examiner, Immigration and Naturalization Service.

[fol. 15] Mr. Wasserman: This is a petition for a writ of habeas corpus and the petition alleges that the relator is a native and citizen of Italy who was ordered deported by the Board of Immigration Appeals in April 1953. He has 21 years residence in the United States. His wife is here, and he has a two-year old American born child.

Three grounds, and I might say that none of these three grounds was previously urged in the prior writ hearing, are urged for the grant of this writ, grant of this petition for habeas corpus, first, that the determination to deport and deny discretionary relief was based upon confidential information. I have set forth the basis for that at length in the petition, that the Attorney General had a confidential list of a hundred; that in October 1952, before the final order

of deportation had been entered here, it had been determined that this was one of the men, one of the hundred who had to be deported; and that the matter was prejudged even before there was a hearing before the Board of Immigration Appeals five months later.

There is only one case on the subject, directly in point, which holds that that violates the law, and that case is [fol. 16] Alexiou v. McGrath, 101 Fed. Supp. 421.

The Court: What violates the law?

Mr. Wasserman: The use of confidential information to determine discretionary relief, to determine whether to allow this man to adjust his status or to deport him.

Here is what Judge Youngdahl said in 101 Fed. Supp., and I am quoting from page 424:

> "Once the Attorney General has established the procedure affording an opportunity for a fair hearing as has been done here, then I do not believe his discretion can be exercised arbitrarily or capriciously in complete disregard of what appears on the record. These proceedings were infected with unfairness by a consideration of matters outside the record."

And I not only allege in the petition that the Attorney General and the Board of Immigration Appeals considered confidential information, I have alleged that matters——

The Court: What is he talking about, outside the record? Is he talking about the Commissioner rendering a decision on matters that are not in the record before him on the hearing?

[fol. 17] Mr. Wasserman: Yes, in determining discretionary relief, your Honor.

The Court: How could the Attorney General consider the record before him? That happened months after he reached his decision. What is he talking about?

Mr. Wasserman: I am not clear that I understand your Honor. We have the Attorney General's decision, the final decision on deportation——

The Court: I asked you what record he was talking about, and you said it was the record before him—Judge Youngdahl, is that right?

Mr. Wasserman: Judge Youngdahl found that in supporting the deportation as against Alexiou, in determining

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Mr. Wasserman: Judge Youngdahl found that in supporting the deportation as against Alexiou, in determining

whether or not they exercised discretionary relief, that the Attorney General denied discretion on the basis of matters outside the record.

The Court: What record?

Mr. Wasserman: The deportation record, the administrative deportation record, and that is what is alleged in this petition before your Honor. He goes on to say:

> "These matters were infected with unfairness by a consideration of matters outside the record. Any action based on such an unfair hearing is a nullity. If [fol.18] that were not so then we would be injecting into our own system of government the very principles of totalitarianism which we are today struggling to strike down. * * * The hearing on eligibility for suspension is tainted, ab initio, with unfairness, because evidence not of record was considered."

And then he found that the deportation order and the denial of discretionary relief were based upon unfairness and had to be set aside.

I rely upon that case. I also rely upon Kaloudis v. Shaughnessy, which was decided by this Circuit, 180 Fed. (2d) 489, where Judge Hand pointed out that if discretionary relief were considered upon the basis of matters that Congress did not intend the Attorney General to consider, that then there would be cause for complaint.

Ever since our 1917 Immigration Act was enacted, for over 20 years, we have always had discretionary relief determined on the administrative record. It is only in the past two years that there has been a change in practice.

Where Congress desired or authorized the Attorney General to consider matters outside the record, it expressly [fol. 19] stated so. Witness the cases of exclusion without a hearing upon confidential information. There it is specifically authorized.

So, you had two things: You had the administrative practice for over 20 years of always considering matters of record, and you have, in addition, the fact that Congress, where it wanted to authorize the Attorney General to consider matters outside the record, did so expressly.

We also allege in the petition that in similar cases, simi-

lar factual cases to this case, discretionary relief has been granted. As a matter of fact, in this very case, in 1945, the Attorney General considered this case a deserving case, one deserving of discretionary relief, and this man's record is as good today, if not better than it was in 1945. He has no criminal record since—for the past 10 years.

The Court: According to your petition, he was, as I remember it, he was granted leave to go and didn't go. Isn't that in his petition?

Mr. Wasserman: Yes, what has happened——

The Court: That is in the petition——

Mr. Wasserman: That is correct.

The Court: Then what are you crying about?

Mr. Wasserman: Paragraph 8 of the petition alleges in [fol. 20] all similar cases the Board of Immigration Appeals has exercised favorable discretion, and its refusal to do so herein constitutes an abuse of discretion. All he needed was one additional item of discretionary relief, known as seven proviso for the crime he committed in 1934. If that were granted, then he could go and get his visa in Canada, otherwise he could not, and it is because of that that he has been unable to adjust his status.

In Knauff v. McGrath, 181 Fed. (2d), 839, Justice Jackson had a similar situation before him, and he said as follows:

> "By the adoption of an invariable practice, he," meaning the Attorney General, "has established a class of situations with respect to which he has always so exercised that discretion as to suspend deportation. That classification is entirely reasonable. To depart from it in a single instance is to act arbitrarily or capriciously to abuse the administrative discretion."

That is what my petition says here. So on that second ground I believe this petition should be signed so this man can have a hearing upon this subject.

Then, finally, I allege that through adverse publicity, in- [fol. 21] stigated by the Attorney General himself, that he has made it impossible to grant fair consideration to this case by his subordinates, and you have the case of Delaney v. United States, 199 Fed. (2d), 107 where, because of ad-

verse publicity given by a Congressional Committee, it was held that it was impossible for a man to have a fair hearing.

The Court: In a certain place.

Mr. Wasserman: In a certain place, that is correct. Well, I think that applies all the more here because, when the Attorney General——

The Court: I don't think it means anything except on its own facts.

Mr. Wasserman: I think these facts are stronger because in that case it was a different arm of the Government.

The Court: What district is that? You just referred to the decision by Judge Jackson.

Mr. Wasserman: Knauff v. McGrath.

The Court: What district is that?

Mr. Wasserman: He was acting as Circuit Judge in this circuit, your Honor. Supreme Court Justice Jackson.

The Court: You mean that is the one where he granted [fol. 22] a writ when they were going to take her out on the plane?

Mr. Wasserman: That is correct.

The Court: Was that opinion published?

Mr. Wasserman: Yes, 181 Fed. (2d), 839.

The Court: Is that all?

Mr. Wasserman: Yes, your Honor.

I feel under these circumstances, because confidential information was used, because the case was prejudged, because in similar cases of the same facts, and the petition so alleges, discretionary relief has been granted, that there has been an unfair hearing here and an abuse of discretion which this Court can correct.

Mr. Sexton: Your Honor, we have prepared an affidavit in opposition to the issuance of the writ, which I should like to hand up to the Court. I point out to the Court that a week ago——

The Court: I will read this first.

Mr. Wasserman: May I have a copy of that?

Mr. Sexton: I am sorry. Yes.

(A pause.)

The Court: What publicity? Who is this brother? I never heard of him.

[fol. 23] Mr. Sexton: I don't know of any publicity my-

self, your Honor, except that around the time of Judge Noonan's writ it was reported in the papers that the writ had been dismissed and there was——

The Court: What is the notoriety about that?

Mr. Wasserman: Frankly, I think there should be no notoriety about him whatsoever. I think it is his brother concerning whom there has been notoriety.

The Court: Who is his brother?

Mr. Wasserman: Samuel Accardi against whom the Attorney General has instituted denaturalization proceedings, apparently on a claim that he is a racketeer. I would like to say to your Honor I have the mimeographed press releases of the Department of Justice concerning this case in my file.

Mr. Sexton: I don't know anything about the press releases, your Honor, but I did see in the paper last week that the Board of Immigration Appeals had denied his motion for a stay of deportation for six months, and prior to that I had seen a piece in The New York Times to the effect that he had actually been deported. As for any newspaper notoriety, that is, that I have seen in the New York papers, and I have read 75 per cent of them since this case started—— [fol. 24] The Court: That makes you a learned man.

Mr. Sexton: Not a learned man.

(A further pause.)

The Court: I will hear you.

Mr. Sexton: Your Honor, I want to point out to the Court that on May 5, which is a week ago this past Tuesday, Judge Noonan signed and entered an order dismissing a prior writ of habeas corpus, and the prior writ of habeas corpus encompassed and sought to achieve everything that is sought to be encompassed by this writ. The same question was presented to the Court.

The Court: What question?

Mr. Sexton: The fact that the administrative officials had abused their discretion in not granting suspension of deportation.

And on the prior writ Judge Noonan endorsed a short decision, a memorandum decision. He says, "A review of the record as a whole fails to demonstrate that there was present a clear abuse of discretion or a clear failure to exer-

cise discretion. Absent either element, this Court cannot review the exercise of discretion by the Board of Immigration Appeals. He cites the Adele case and continues, "The writ is accordingly dismissed and the relator remanded to [fol. 25] the custody of the respondent."

Exactly everything that has been brought up this morning except this business about confidential information and newspaper publicity.

I submit to the Court that the newspaper publicity, or whatever publicity my friend is referring to——

The Court: I agree with you on that.

Mr. Sexton:—had nothing to do with the Attorney General's determination.

As to the confidential information, my friend hasn't shown you the Attorney General utilized the confidential information, where or when he utilized it, and a reading of the decision of the——

The Court: That is so, isn't it, according to Judge Noonan? That is so, isnt' it, under Judge Noonan's decision?

Mr. Wasserman: No, there was nothing——

The Court: How do you know that he considered anything except what Judge Noonan has reviewed?

Mr. Wasserman: We were told in Washington, the prior counsel in this case was told in Washington, that this man's name was on this list of a hundred. I know from my own——

The Court: What about it? Supposing it was?

[fol. 26] Mr. Wasserman: Supposing? I am prepared to say that in any case, and in this case in particular, that in October, prior—1952—before the final order of deportation was rendered, the Attorney General placed his name on a confidential list of a hundred. It is a mimeographed list which was circulated to everyone in the Immigration Service. They were told, and I know it from my own experience of other cases, because I happen to represent other people on that list, you find it difficult to get adjournments of those cases, you are told, "We can't do anything for you because your client's name is on the list of a hundred." I understand that former counsel in this case spoke to the Commissioner and the Commissioner told him, "We can't do a thing in your case because the Attorney General has his

name on that list of a hundred." The result is, once your name got on that list of a hundred, and it was done in the secrecy of the Attorney General's office, you couldn't get the right time, no less get discretionary relief.

The Court: Judge Noonan has gone over the record.

Mr. Wasserman: But that was not before Judge Noonan. [fol. 27] The Court: What was not before him?

Mr. Wasserman: The fact that there was this list of a hundred.

The Court: Of course, it wasn't, and you couldn't put it before anybody. It is just one of your own ideas.

Mr. Wasserman: No, it is not. I think I am entitled to a hearing to establish that.

The Court: Establish what?

Mr. Wasserman: That there was this list of a hundred and there was confidential information used to determine this case, and I am ready to prove it.

The Court: But they didn't need it. Suppose there was a mountain of it ? The fact is they didn't need it, and they had a record which they submitted to Judge Noonan and he found that record was sufficient to support the decision.

Mr. Wasserman: But that doesn't——

Mr. Sexton: I might clarify it, your Honor. I was present and I myself told the judge who presided, Judge Noonan, that this man was on the Attorney General's proscribed list of alien deportees. I told it to him, so it was before Judge Noonan.

Mr. Wasserman: Yes, but counsel for the relator made [fol. 28] no point of it. I didn't have the Alexiou——

Mr. Sexton: It was before the Court.

Mr. Wasserman: ——case. There is the Government admitting that there was a proscribed list which was prepared in October of——

The Court: I have read your petition, by the way—and, talking about prejudgment, I suppose I oughtn't say I looked at it, but I did look at it—and I thought it was quite insufficient, and I think so now after hearing, and I am certainly not going to condemn any judge to listen to your assertions that are not borne out by anything. You can charge the Attorney General with having read the morning newspapers and having made up his mind on that, but the fact of the matter is—that is proved—that he had a record

Mr. Sexton: I might also point out——
before him on which he acted and the judge determined that it was sufficient to sustain him.

Mr. Wasserman: I think that to deny relief or to deny this man a hearing certainly flies in the face of the Alexiou case and certainly deprives him of a hearing. Here are the allegations, some of which have even been admitted by the Government——

The Court: I am going to refuse the writ.

[fol. 29] Mr. Wasserman: Will your Honor grant me a stay so I can apply to the Court of Appeals?

The Court: No, sir.

Do you want to take this and have it entered, Mr. Sexton?

Mr. Sexton: Yes, your Honor.

Mr. Wasserman: Is it at all possible for me to have these papers to present to the Court of Appeals? I don't know whether or not they are in session or whether I can get a judge today. I would like——

The Court: Will you do that for him?

Mr. Wasserman: ——to attempt to.

The Court: Go with Mr. Sweeney (a clerk) and when he has entered it, he will let you take them up there. Somebody will have to go or you will have to be responsible.

Mr. Wasserman: I am willing to do either one.

[fol. 30] In United States District Court

Notice of Appeal

The above named Joseph Accardi, relator herein, hereby appeals from the order of the District Court of May 16, 1953, denying relator's petition for habeas corpus.

Jack Wasserman, Attorney for Relator, Warner Building, Washington, D. C.; 35-55 73rd Street, Jackson Heights, L. I., New York.

To: United States Attorney.

[fol. 31] In United States District Court

[Title omitted]

Stipulation as to Record—May 29, 1953

It is hereby stipulated and agreed, that the foregoing is a true copy of the transcript of the record of the said District Court in the above entitled matter as agreed on by the parties.

Dated: New York, N. Y., May 29, 1953.

Jack Wasserman, Attorney for Relator-Appellant.

J. Edward Lumbard, U. S. Attorney, Attorney for Respondent Appellee.

[fol. 32] Clerks' Certificate to foregoing transcript omitted in printing.

[fol. 33] In United States Court of Appeals for the Second Circuit, October Term, 1952

No. 287

(Argued June 2, 1953. Decided August 11, 1953)

Docket No. 22750

United States of America, ex rel. Joseph Accardi, Relator-Appellant,

v.

Edward J. Shaughnessy, District Director of the Immigration and Naturalization Service, New York District, Department of Justice, Respondent-Appellee

Before Swan, Clark and Frank, Circuit Judges

Appeal from the United States District Court for the Southern District of New York, Clancy, Judge

This appeal brings up an order denying a petition for issuance of a second writ of habeas corpus to review an administrative refusal to suspend deportation of the appellant. Order affirmed.

[fol. 34] Jack Wasserman, Attorney for appellant; Irving Radar, of Counsel.

J. Edward Lumbard, United States Attorney, for appellee; William J. Sexton, Assistant United States Attorney, of Counsel.

OPINION

SWAN, Circuit Judge:

This appeal presents the question whether the District Judge erred in refusing to issue a second writ of habeas corpus to review a decision of the Board of Immigration Appeals which denied the application of a deportable alien for suspension of deportation pursuant to section 19 of the Immigration Act of 1917 as amended, 8 U. S. C. A. § 155(c), of which the relevant portion reads as follows:

> "In the case of any alien * * * who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may * * * suspend deportation of such alien * * * if he finds that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent or minor child of such deportable alien. * * *[1]

The appellant is an alien of Italian nativity and citizenship who entered the United States in 1932 with intent [fol. 35] to remain permanently and without possessing an

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[1] This statute was repealed by the Immigration and Nationality Act of June 27, 1952, effective 180 days thereafter, and the provisions as to discretionary suspension of deportation were replaced by section 244 of the 1952 Act, 8 U. S. C. A. § 1254. However, the "savings clauses" of the later Act, kept the earlier statute alive for pending proceedings, and provided that "An application for suspension of deportation under section 19 of the Immigration Act of 1917, as amended * * * which is pending on the date of the enactment of this Act, shall be regarded as a proceeding within the meaning of this subsection." P. L. 414, § 405(a), 66 Stat. 280. The appellant's application was pending until the Board of Immigration Appeals rendered its decision on April 3, 1953.

immigration visa. He has resided here continuously since entry, was married in 1949 to a legally resident alien, and has a two year old American-born child. Proceedings for his deportation were instituted in 1947 and, after a hearing, he was found deportable on the charge of illegal entry without an immigration visa. The proceedings were later reopened to receive further evidence concerning his application for suspension of deportation. Such discretionary relief was denied by the hearing officer in May 1952. His decision was thereafter adopted by the Acting Commissioner and was affirmed by the Board of Immigration Appeals on April 3, 1953. The Board's opinion reviewed the evidence and concluded with the statement: "After consideration of all the facts and circumstances in the case, we believe that the applications for relief should be denied as a matter of administrative discretion." Thereafter the appellant was taken into custody for deportation and he promptly sued out a writ of habeas corpus which Judge Noonan dismissed by order entered May 5, 1953.[2] This order was not appealed.[3] On May 16 the petition for issuance of a second writ was presented. This petition, like that on which the first writ issued, attacks only the Board's denial of discretionary relief. The charge on which the appellant has been found deportable is admitted. The case was heard on affidavits and oral argument without testimony being taken. Judge Ciancy refused to issue the writ. Deportation has been stayed pending determination of the appeal from such refusal.

[fol. 36] An order dismissing one writ of habeas corpus does not formally estop the relator from suing out another

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[2] Judge Noonan's memorandum decision reads: "A review of the record as a whole, fails to demonstrate that there was present a clear abuse of discretion or clear failure to exercise discretion. Absent either element this court cannot review the exercise of discretion by the Board of Immigration Appeals. (United States ex rel. Adel v. Shaughnessy, 183 F. 2d 371.)"

[3] The appellant's brief on the present appeal admits that dismissal of the first writ was correct.

on the same grounds.[4] Nevertheless it may properly be given controlling weight if the same grounds are urged in a second writ.[5] The appellant contends that the second petition alleged new grounds of attack upon the administrative denial of suspension of deportation, namely, that the Board of Immigration Appeals improperly exercised its discretion (1) because it considered confidential information and other material outside the record, (2) because the case had been prejudged by the Attorney General, and (3) because other aliens similarly situated had been granted discretionary relief. These grounds were not alleged in the first petition. Ground (1) is alleged in paragraphs 11-16, ground (2) in paragraph 19, and ground (3) in paragraphs 9-10 of the second petition; they are printed in the margin.[6] These charges, alleged upon information and

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[4] *Salinger* v. *Loisel*, 265 U. S. 224, 230; *United States* v. *Thompson*, 2 Cir., 144 F. 2d 604, 606, cert. den. 323 U. S. 790.

[5] *Wong Doo* v. *United States*, 265 U. S. 239, 241; *United States* v. *Thompson, supra; United States ex rel. Karpathiou* v. *Jordon*, 7 Cir., 153 F. 2d 810, cert. den. 328 U. S. 868.

[6] "9. That on April 6, 1945, favorable discretionary relief was exercised herein in the form of voluntary departure and preexamination, but my husband was unable to take advantage of this because the American Consul refused to issue a visa to him on the ground that he had been convicted of a crime in 1934.

10. That the aforesaid criminal ground may be waived by the Board of Immigration Appeals and in all similar cases has been waived by the Board of Immigration Appeals.

11. Upon information and belief that the Department of Justice maintains a confidential file with respect to my husband.

12. Upon information and belief that on or about October 2, 1952, the Attorney General announced at a press conference that he planned to deport certain so-called 'unsavory characters.'

13. That upon information and belief, on or about October 2, 1952, the Attorney General prepared a list of one

belief, were categorically denied in an opposing affidavit [fol. 37] which also incorporated by reference the administrative record. There is absolutely nothing in that record to indicate that the administrative officials considered anything outside the record. Indeed the October 1952 list of "unsavory characters" and the press conference concerning it occurred months after the hearing officer's decision and

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hundred individuals whose deportation he sought in accordance with the announcement made at his press conference of October 2, 1952.

14. Upon information and belief, that included in this list of one hundred persons was the name of my husband, Joseph Accardi.

15. Upon information and belief, that the aforesaid list of one hundred individuals, including the name of my husband, was circulated by the Department of Justice among all its employees connected with the Immigration Service and the Board of Immigration Appeals.

16. Upon information and belief, that because of the listing of my husband's name on this confidential list and because of consideration of matters outside the record of his immigration hearing, discretionary relief has been denied to permit my husband to adjust his immigration status to that of a permanent resident.

17. That application was made during the month of May, 1953, for reconsideration of my husband's case and such reconsideration has resulted in a reaffirmance of the order of deportation herein.

18. Upon information and belief that the Attorney General has issued several press releases with regard to my husband's case during the month of April, 1953, and because of the unfavorable publicity accorded to this case at the instigation of the Attorney General, it has not been possible to secure a fair reconsideration and rehearing of this matter.

19. That the decision to deny favorable discretionary relief herein was pre-judged by the Attorney General on October 2, 1952, when he included my husband's name in the list of one hundred so-called 'unsavory characters' and since that time it has been impossible for my husband to secure fair consideration of his case."

the Assistant Commissioner's adoption of it, and could not have influenced them. The Board's opinion discusses only the evidence in the record, and such evidence was amply sufficient to support discretionary denial of suspension of deportation. As this court said in *United States ex rel. Kaloudis* v. *Shaughnessy*, 180 F. 2d 489, 490, an alien has no privilege of inquiring into the grounds on which the Attorney General has denied suspension of deportation; "un- [fol. 38] less the ground stated is on its face insufficient, he must accept the decision, for it was made in the 'exercise of discretion,' which we have again and again declared that we will not review." In this respect the case at bar is unlike *Alexiou* v. *McGrath* (D. C. D. C.), 101 F. Supp. 421, where it affirmatievly appeared that evidence not of record was considered on the issue of eligibility for suspension of deportation.

We may assume *arguendo*, as we did in *United States ex rel. Weddeke* v. *Watkins*, 166 F. 2d 369, 371, cert. den. 333 U. S. 876, that since the Attorney General has provided by regulations the procedure by which a deportable alien is accorded a hearing on his application to suspend deportation, that he is entitled to procedural due process in the conduct of such hearing; that is, the requirements of a fair hearing must be met.[7] Nothing alleged in the petition for a second writ suggests that such requirements were not observed in the initial hearing or in the affirmance of the hearing officer's decision by the Assistant Commissioner of Immigration. The relator alleges "belief," based on the existence of the subsequently created list of undesirable aliens, that the Board of Immigration Appeals was influenced by this list in affirming the decision denying suspension. The allegation that the Attorney General had prejudged the application for discretionary relief by including the appellant's name in the October 1952 list is substantially only a reiteration of the first ground of complaint. That the Board considered matters outside the

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[7] See also *United States ex rel. Giacalone* v. *Miller* (S. D. N. Y.), 86 F. Supp. 655, 657; *United States ex rel. Bauer* v. *Shaughnessy*, S. D. N. Y. Civ. 50-217, 1949, unreported; *Chavez* v. *McGranery* (S. D. Cal.), 108 F. Supp. 255.

record was denied by the opposing affidavit, and the Board's opinion appears to corroborate such denial. In the opinion of a majority of the court, the assertion of a mere sus- [fol. 39] picision or "belief" that the Board considered other matters did not require the issuance of a second writ. Were this enough, every deportable alien would so allege, merely to delay his justifiable deportation.

The third ground of complaint, that "in all similar cases" the Board had exercised its discretion in favor of deportable aliens convicted of crime is completely without merit. Suspension of deportation is a discretionary matter. In the exercise of its discretion it is permissible for the Board to take into account the alien's earlier bad conduct. *United States ex rel. Adel* v. *Shaughnessy,* 2 Cir., 183 F. 2d 371. The facts set out in the Board's opinion respecting his criminal record and his tenuously explained affluence were ample justification for denial of discretionary relief. Nor does the allegation that the appellant was treated differently from other aliens similarly situated raise a triable issue of fact. Determination of what weight to give to a prior conviction of crime necessarily depends upon the circumstances of the particular case. No two cases can be precisely similar. The appellant tries to bring himself within the scope of *United States ex rel. Knauff* v. *McGrath,* 2 Cir., 181 F. 2d 839, vacated as moot, 340 U. S. 940, where it was alleged that the uniform practice was to defer deportation in all cases where a bill of relief was pending in Congress. There the uniform practice was a provable fact. It is not such when, as here, the alleged uniform practice relates to the appraisement of the moral reformation of convicted deportees.

Order Affirmed.

[fol. 40] FRANK, Circuit Judge (dissenting):

I dissent because I think the district judge erred in refusing to hear testimony offered by the relator, to show that the hearing before the Board was a farce.

Suppose the Supreme Court were secretly to notify all judges of inferior federal courts that in the future it would reverse all judgments they entered if favorable to certain designated persons. Accardi's wife (in the second habeas

corpus petition) asserts that we have here something of that sort—but worse. Let us see:

By a valid regulation,[1] having the effect of a law,[2] the Attorney General has provided that one who applies for discretionary relief under the statute shall receive a hearing before the Board of Immigration Appeals on his appeal from a decision, adverse to the applicant, made by the Commissioner or Acting Commissioner. Another regulation provides that the Attorney General may review and reverse any decision made by the Board.[2a] These regulations—which, while they stand, bind the Attorney General and his subordinates[3]—mean, I think, that decision by the Board or the Attorney General as to the grant or refusal of such relief must not be made until after a hearing by the Board.[4] If it can be shown that, as the relator alleged in the second petition for habeas corpus, the decision adverse to discretionary relief in Accardi's case was made by the Attorney General in 1952 before Accardi had had a Board hearing (in 1953), so that the purported Board [fol. 41] hearing was but a sham, then it will appear that discretion has not been exercised as required by the regulation. In that event, habeas corpus should be granted, unless within a reasonable time an administrative decision is made on the basis of a Board hearing in accordance with the regulation and without regard to the pre-hearing decision by the Attorney General. See *United States ex rel. Mastrapasqua* v. *Shaughnessy*, 180 F. (2d) 999, 1003-1004 (C. A. 2). For while courts cannot review the exercise of administrative discretion nor themselves exercise it, they can and should compel its exercise where the officer vested with

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[1] 8 C. F. R. (1949 ed. Pocket Part) §§ 150.7(a), (b), 150.11(b), 150.13(b), and Part 151, esp. §§ 151.2(c), 151.3(e), 151.5(e); note *infra*.

[2] See, e. g., *Boske* v. *Commagore*, 177 U. S. 459; *U. S. ex rel. Mastrapasqua* v. *Shaughnessy*, 180 F. (2d) 999, 1001 (C. A. 2).

[2a] 8 C. F. R. (1949 ed.) §§ 90.3, 90.12; *cf.* 8 C. F. R. (Rev. ed. 1952) § 1.2.

[3] See, e. g., *Bridges* v. *Wixon*, 326 U. S. 135, 153.

[4] Cf. *Alexiou* v. *McGrath*, 101 F. Supp. 421.

the discretion has failed to do so. *United States ex rel. Mastrapasqua* v. *Shaughnessy, supra,* at 1002.

Relator alleged in the second habeas corpus petition that the pre-hearing decision consisted of the inclusion of Accardi's name in a secret list of aliens whom the Attorney General had decided must be expelled from the United States, this secret list having been circulated in October 1952 among all the Attorney General's subordinates in the Department of Justice, including the Board, and having since been approved with reference to Accardi by the present Attorney General—all previous to the administrative hearing on Accardi's petition for discretionary relief. Relator argues, in effect, that, since the Attorney General was the Board's superior, and since he could reverse any decision made by the Board concerning such relief,[5] his issuance in 1952 of the secret list obliged the Board in 1953 to refuse to exercise its discretion in Accardi's favor,[6] and

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[5] See note 2a, *supra.*

[6] Pertinent allegations of the petition were:

"12. Upon information and belief that on or about October 2, 1952, the Attorney General announced at a press conference that he planned to deport certain so-called 'unsavory characters.'

"13. That upon information and belief, on or about October 2, 1952, the Attorney General prepared a list of one hundred individuals whose deportation he sought in accordance with the announcement made at his press conference of October 2, 1952.

"14. Upon information and belief, that included in this list of one hundred persons was the name of my husband, Joseph Accardi.

"15. Upon information and belief, that the aforesaid list of one hundred individuals, including the name of my husband, was circulated by the Department of Justice among all its employees connected with the Immigration Service and the Board of Immigration Appeals.

"16. Upon information and belief, that because of the listing of my husband's name on this confidential list and because of consideration of matters outside the record of his immigration hearing, discretionary relief has been de-

[fol. 42] compelled it to act without considering the countervailing evidence, *e. g.*, that Accardi has lived in the United States for 21 years, is the husband of a lawful resident of the United States and the father of a two-year-old American-born child. Respondent, in his traverse in the district court, denied the allegation of prejudgment. But relator's counsel proposed in the district court to prove the contrary by evidence to be adduced in court. He proposed to prove, not only the specific facts alleged in the habeas corpus petition concerning the Attorney General's prejudgment, but also that Accardi's former counsel had been told by the Commissioner, "We can't do a thing" in Accardi's case "because the Attorney General has his name on that list."[7] Yet the district judge refused to hear any testimony, *i.e.*, refused to conduct a trial to determine whether relator's allegations or respondent's denials were true.

[fol. 43] Obviously, we would reverse if the Board in its opinion had said: "We deny relief because the Attorney General has already decided, previous to the application for relief, that Accardi is not to receive any discretionary relief." So the crucial question here is whether relator had a right to prove, by evidence outside the record, that in truth such was the ground of the Board's action. My colleagues,

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nied to permit my husband to adjust his immigration status to that of a permanent resident. * * *

"19. That the decision to deny favorable discretionary relief herein was pre-judged by the Attorney General on October 2, 1952, when he included my husband's name in the list of one hundred so-called 'unsavory characters' and since that time it has been impossible for my husband to secure fair consideration of his case.

"20. That the present Attorney General has continued the policies and practices of his predecessor with reference to my husband's case."

[7] Relator's counsel, on the hearing of the petition, said he understood "that former counsel in this case spoke to the Commissioner and the Commissioner told him, 'We can't do a thing in your case because the Attorney General has his name on that list of a hundred.'"

accepting the district judge's view, take this position: Even if it is a fact that Accardi's application for relief was unlawfully prejudged by the Attorney General so that the Board's hearing was a pure pretense, nevertheless no court can pay any attention to that fact. Why? Because, so my colleagues maintain, (1) the record of the administrative hearing and the opinion of the Board contain no reference to the Attorney General's list, and, on their face, disclose nothing to indicate any irregularity; (2) the courts lack power to go behind such an administrative record; (3) relator's allegations as to the Attorney General's prejudgment are "on information and belief."

I cannot agree. Respondent's "nice, sharp quillets of the law" should not take us in. There is no doctrine that a court may never go outside such an official record to discover whether an official himself unlawfully acted on matters outside the record. Having served for a considerable period as an administrative officer, I am fairly callous to the cries of men who denounce all such officers as power-hungry bureaucrats, and I am perhaps unusually aware of the danger to the workings of government if any administrative officer could be dragged into court, to stand trial, on a mere suspicion of impropriety behind the scenes. However, there would be greater danger to democratic government in judicial acceptance of every administrative record as final and invulnerable, no matter how grave and serious the charges against the official.

[fol. 44] While ordinarily a court must confine itself to the administrative record,[8] there are exceptions. Even a court's judgment, valid so far as the judicial record goes, will be vacated years later if it be then proved, by evidence entirely beyond the bounds of the record, to have been procured by bribery of a judge. *Root Refining Co.* v. *Universal Products Oil Co.*, 169 F. 2d 514 (C. A. 3). And the same doctrine applies if the judgment resulted from what amounts to a judge's decision of a case made before it

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[8] *United States* v. *Morgan*, 313 U. S. 409, 422; *Chicago, B. & O. R. Co.* v. *Babcock*, 204 U. S. 588, 593; *Fayerweather* v. *Ritch*, 195 U. S. 276, 306-307.

began.[9] Ours would be a sorry legal system if it completely shielded from attack a judge's or other official's order simply because the facts revealing its illegality are not in the official record on which the order purports to rest. To confer such immunity would be to make legality a matter of sheer ritualism, of mere outward looks. That way lies tyranny.

My colleagues say that "there is absolutely nothing in the record to indicate that the administrative officials considered anything outside the record." But the same was true in the *Root Refining* case, *i.e.*, the record was obviously silent as to the bribery of the judge which brought about the decision, since necessarily that was a secret fact—in that respect like the Attorney General's list. Moreover, relief by habeas corpus inherently involves judicial reliance on facts not in the record supporting the judgment which habeas corpus collaterally attacks.[9a]

Of course, an attack on an official's decision, by recourse to off-the-record evidence, is not allowed if the allegations are vague. Legality should be more than well-ordered paper work, but allowable peering behind the paper facade [fol. 45] has its limits. One may not compel an official to submit to courtroom interrogation in the search for possible concealed, unlawful behavior, unless one first brings forward some striking traces of it. As a consequence, well-concealed misconduct may escape judicial correction.[10] That is the price we pay to avoid having governmental action at the mercy of anyone who voices mere suspicions. For instance, to open up the judgment in the *Root Refining* case, it would not have sufficed to allege, without more, "The judge was bribed." There must be an offer to prove specific facts which will pretty plainly impugn the official record.

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[9] See *Schwab* v. *Coleman*, 145 F. (2d) 672 (C. A. 4).

[9a] See *Moore* v. *Dempsey*, 261 U. S. 86.

[10] See, e. g., *Broadcast Music* v. *Havana Madrid Restaurant Corp.*, 175 F. (2d) 77, 80 (C. A. 2).

Relator here satisfied that requirement: Not only did she offer proof of the Attorney General's list—a secret, official document of marked evidentiary significance tending strongly to show that the Attorney General had stripped the Board of discretion in Accardi's case—but she also offered to prove that the Commissioner of Immigration had said to Accardi's counsel that such was the purpose and effect of including Accardi's name in that list.

Finally, I disagree with my colleagues when they say that no attention may be paid to the allegation of secret prejudgment by the Attorney General because it is made on information and belief. Surely we would not refuse to act in a case like *Root Refining* on a sufficiently specific charge that a judge had been bribed to decide the case, merely because the facts, necessarily not within the first-hand knowledge of the party so charging, were stated on such information and belief. In a variety of circumstances, it has been held that such an allegation suffices where, as here, the asserted facts are thus not within affiant's personal [fol. 46] knowledge.[10a] I think the district court should be directed to afford relator an opportunity to prove those facts, just as in the *Root Refining* case the Supreme Court ordered a trial of the movant's charge of bribery.[11] I do not for a moment intimate that relator's allegations are true; I urge only that we ought not now assume that they are false. It will not do, I think, to hold it enough that the outside of the administrative cup is clean.[12]

[10a] See, e. g. *Berger* v. *United States*, 255 U. S. 22, 34-5; *Kelly* v. *United States*, 250 Fed. 947, 948-9 (C. A. 9); *Creekmore* v. *United States*, 237 Fed. 743 (C. A. 8).

[11] *Universal Oil Co.* v. *Root Refining Co.*, 328 U. S. 575, 580.

[12] "For ye make clean the outside of the cup and platter, but within they are full of extortion and excess." Matt. 23, 25.

[fol. 47] In United States Court of Appeals for the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 11th day of August one thousand nine hundred and fifty-three.

Present: Hon. Thomas W. Swan, Chief Judge, Hon. Charles E. Clark, Hon. Jerome N. Frank, Circuit Judges.

United States ex rel. Joseph Accardi, Relator-Appellant,

v.

Edward J. Shaughnessy, District Director of Immigration & Naturalization, Respondent-Appellee

Judgment—Filed August 11, 1953

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fol. 48] [File endorsement omitted.]

[fol. 49] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 50] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. 366

UNITED STATES OF AMERICA, EX REL. JOSEPH ACCARDI, Petitioner

vs.

EDWARD J. SHAUGHNESSY, District Director of the Immigration and Naturalization Service, etc.

ORDER ALLOWING CERTIORARI—Filed November 16, 1953

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(1937)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 366

UNITED STATES OF AMERICA, EX REL. JOSEPH ACCARDI,

Petitioner,

vs.

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE, NEW YORK DISTRICT, DEPARTMENT OF JUSTICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JACK WASSERMAN,
Attorney for Petitioner,
Warner Building,
Washington 4, D. C.

BLEED THROUGH-

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SUPREME COURT OF THE UNITED STATES

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No.

UNITED STATES OF AMERICA, EX REL. JOSEPH ACCARDI,

Petitioner,

vs.

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF THE IMMIGRATION AND NARURALIZATION SERVICE, NEW YORK DISTRICT, DEPARTMENT OF JUSTICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The petitioner, Joseph Accardi, by his attorney, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit which affirmed, by a divided court, the refusal of the District Court for the Southern District of New York to issue a writ of habeas corpus.

Opinions Below

The Court of Appeals affirmed the judgment of the District Court by a divided vote. The majority and dissenting opinions are not yet reported and are set forth beginning at page 17 of the record. The District Court rendered no opinion.

Jurisdiction

The judgment of the Court of Appeals was entered on August 11, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Questions Presented

1. Where an alien is entitled to a deportation hearing conforming to procedural due process, and the administrative record, submitted to the Court, does not reveal *on its face* that matters outside that record were considered or that the case was prejudged, is he precluded from alleging and proving that his hearing was infected with the unfair utilization of confidential information and with prejudgment of his case?

2. Does a petition for a writ of habeas corpus state a cause of action where it alleges unfairness in a deportation hearing by reason of the use of confidential information, prejudgment of the case, and treatment of petitioner, different from all aliens similarly situated?

3. Upon an application for a writ of habeas corpus, may the Court go beyond the application and resolve disputed questions of fact in favor of the government, without affording the petitioner a hearing upon such disputed issues?

Statutes Involved

28 U.S.C. 2243 provides in part:

> "A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the

writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

* * * * *

"Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained."

Section 19(c) of the Immigration Act of 1917 (62 Stat. 1206; 8 U.S.C. 155 (c)), as amended provides in pertinent part as follows:

"In the case of any alien (other than one to whom subsection (d) is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States to any country of his choice at his own expense in lieu of deportation, or (2) suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act."

The Seventh Proviso of Section 3 of the Immigration Act of 1917 as amended (39 Stat. 875-878, 8 U.S.C. 136) provides in part as follows:

"Aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years may be admitted in the discretion of the Attorney General, and under such conditions as he may prescribe."

8 C.F.R. 150.7 (b) which was in force under the 1917 Immigration Act as amended provided in part as follows:

> "*Eligibility for departure in lieu of deportation or for suspension of deportation.* If the alien has applied for the privilege of departure in lieu of deportation or for suspension of deportation • • • the presiding inspector shall follow his conclusions of law as to the alien's deportability with a discussion of the *evidence* relating to the aliens eligibility for such relief and his reasons for his proposed order. • • •"

Section 405(a) of Public Law 414 (66 Stat. 280), known as the Immigration and Nationality Act of 1952 provides:

> "Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any • • • proceedings • • • done or existing at the time this Act shall take effect; but as to all such • • • proceedings • • • the statutes • • • repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. • • • An application for suspension of deportation under section 19 of the Immigration Act of 1917, as amended, • • • which is pending on the date of the enactment of this Act, shall be regarded as a proceeding within the meaning of this subsection."

Statement

The petitioner seeks through this second application for a writ of habeas corpus to review the legality of a deportation order entered against him on April 3, 1953.

Petitioner asserts that he is a citizen of Italy, that he last entered the United States in 1932, and that he now has a residence of twenty-one years in the United States. He is married to a lawful resident of the United States, has a two year old American born child, and has been a person of good moral character for the past ten years (R. 2-3 Par. 2-7).

Petitioner has been ordered deported upon the ground that he entered the United States in 1932 without a visa (R. 2 Par. 4). The Immigration File of petitioner which was lodged with the Courts below reveals that the only adverse factors in his record were two arrests in 1933 and 1934 which did not result in convictions and a 1940 suspended sentence for violation of 18 U.S.C. 88. The allegation in the application of petitioner's good moral character for the past ten years (R. 3 Par. 7) was not only unopposed but was corroborated by a favorable finding in the decision of the Board of Immigration Appeals, dated April 3, 1953. Notwithstanding his good moral character, his long residence here and his family ties, the Board without assigning reasons, refused to exercise discretion to permit petitioner to remain in the United States as a permanent resident (R. 3 Par. 5). The instant application for habeas corpus alleges, as found by the court below (R. 20) the following new matters which were not presented in the first petition and which furnished a basis for the issuance of a second writ under 28 U.S.C. 2243, 2244:

(1) That the Attorney General maintains a confidential file relative to petitioner, that the government has included his name on a secret purge list, and that because of confidential information and other matters outside the record including the proscribed listing of his name by the Attorney General in October 8, 1952, petitioner was ordered deported in 1953. (R. 3-4 Par. 11-16).

(2) That the Attorney General decided to deport petitioner in October of 1952 and accordingly the case was prejudged in advance of the Board's decision of April 3, 1953. (R. 4 Par. 19).

(3) That notwithstanding the fact that the case was considered deserving of discretionary relief in 1945, and notwithstanding the fact that discretionary relief had been

granted in all similar cases, it was denied in the instant case (R. 3 Par. 9-10).

In the District Court the respondent urged that the present writ herein should not issue because of the prior dismissal of the first application herein. Respondent also denied that matters outside the record were considered, that the case was prejudged, or that relief from deportation had been granted in all similarly situated cases (R. 5-7). The government did admit, however, in open court that the petitioner was on the so-called proscribed list of the Attorney General (R. 15). The District Court denied the application, not as a matter of discretion, but upon the ground that the allegations of the petition for habeas corpus, did not state a basis for the issuance of a writ (R. 15). Accordingly, the merits of the application rather than than the lower courts' exercise of discretion were presented for review to the Appellate Court. *Salinger* v. *Loisel*, 265 U.S. 224,232.

The Circuit Court affirmed in a divided opinion (R. 17). The majority decision, following *Alexiou* v. *McGrath*, 101 F. Supp. 421 (D. C. Dist. of Col. 1951) and *U. S. ex rel Weddeke* v. *Watkins*, 166 F. 2d 369 (C.A. 2, 1948), acknowledges that the Immigration Regulations (8 C.F.R. 150.7 (b)) required a due process hearing upon the exercise of discretion to suspend deportation and grant petitioner permanent residence. It further assumes that matters outside the record may not be considered but decides that judicial intervention is only warranted (1) where administrative officials acknowledge utilization of off-the-record material and prejudgment of a case upon the record or file submitted to the court and (2) where allegations of such facts are not made upon information and belief. The majority opinion concludes that the allegation that all similarly situated cases

have been granted permanent residence, is not a provable fact.

The dissenting opinion of Judge Frank takes sharp issue with these conclusions. He states (R. 27):

> "There is no doctrine that a court may never go outside such an official record to discover whether an official himself unlawfully acted on matters outside the record. * * * Ours would be a sorry legal system if it completely shielded from attack a judge's or other official's order simply because the facts revealing its illegality are not in the official record on which the order purports to rest. To confer such immunity would be to make legality a matter of sheer ritualism, of mere outward looks. That way lies tyranny."

Judge Frank asserted that petitioner was entitled to a hearing to establish the truth of the contentions in his application. The dissent considered the allegations made upon information and belief sufficient in conformity with the general practice to plead in this manner where a litigant lacks personal knowledge.

Reasons for Granting Certiorari

This writ of certiorari is sought because the issues presented herein raise important questions of federal pleading and practice, as well as important questions of administrative law. In addition the decision below is in conflict with decisions of this Court and contrary to decisions of other circuits.

1. The majority decision requires that administrative officials furnish evidence of their own improper conduct in their own decisions or in the particular file they choose to lodge with the court. Upon their refusal so to do, as in the instant case where it is claimed that a due process deportation hearing was denied by utilization of confidential in-

formation, the majority below would deny judicial intervention. The dissenting opinion properly denies that this startlingly novel doctrine has any acceptance in the democratic processes of administrative law or federal practice. It finds that this tyrannical concept is contrary to the spirit and principle of *Universal Oil Co.* v. *Root Refining Co.*, 328 U.S. 575,580. This is an issue which requires Supreme Court review not only because of conflict with the *Root* decision and *Kwock Jan Fat* v. *White*, 253 U.S. 455 but also because of the importance of the principle enunciated by the Court below.

2. The Court below considered insufficient assertions in the habeas corpus application alleged upon information and belief. The dissent properly observed that this traditional manner of alleging facts not within the pleader's personal knowledge had been approved by the Supreme Court and in other circuits. *Berger* v. *United States*, 255 U. S. 22, 34-35; *Kelly* v. *United States*, 250 Fed. 947, 948-9 (C.A. 9); *Creekmore* v. *United States*, 237 Fed. 743 (C.A. 8); See also: *Shaw* v. *Protane Corp.*, 1 F. Supp. 980 (W.D. Pa., 1932); *Midwest Mfg. Co.* v. *Staynew Filter Corp.*, 12 F. Supp. 876, 880 (W.D. N.Y., 1935). This issue presents an important question of federal pleading and practice.

This Court has commented appropriately that a "petition for habeas corpus ought not to be scrutinized with technical nicety. Even if it is insufficient in substance it may be amended in the interest of justice." *Holiday* v. *Johnston*, 313 U. S. 342, 350.

The majority, below, in refusing to accept allegations upon information and belief, paid little heed to this observation. It elevated form over substance and in so doing, it disregarded decisions of this Court and other circuits.

3. The decision below accepted as an established fact, and in the absence of a hearing, the government's denial of

prejudgment and utilization of confidential information. It also decided without any proof or hearing, that petitioner's allegation that his case was treated differently from all similar cases, was not a provable fact. This amazing principle suspends the great writ of habeas corpus. It resolves all disputed questions of fact in favor of the government, without a hearing and without permitting parties to submit proof of their contentions. The importance of this doctrine in habeas corpus practice and procedure in manifest.

In *Price* v. *Johnston*, 334 U. S. 266, 291 this Court observed: "Appellate Courts cannot make factual determinations which may be decisive of vital rights where the crucial facts have not been developed." To the same effect as to requirements of a hearing on disputed facts are: *Walker* v. *Johnston*, 312 U. S. 275, 285, 287; *Holiday* v. *Johnston*, 313 U. S. 342, 350; *Waley* v. *Johnston*, 316 U. S. 101; *Cochrane* v. *Kansas*, 316 U. S. 255; *Stewart* v. *Overholzer*, 186 F. 2d 339, 342 (C.A. D.C., 1950). The doctrine applies even though the Appellate Court might, as did the majority below, consider the allegations improbable or incapable of proof. *Holiday* v. *Johnston, supra, Waley* v. *Johnston, supra.*

The Court below, contrary to these decisions of this Court and other circuits, resolved disputed questions of fact without a hearing. Because of this conflict, it is submitted that certiorari is appropriate.

4. The decision below is in direct conflict with the mandate of 28 U.S.C. 2243 which requires that an application for a writ should be signed or entertained "Unless it appears from the *application* that the applicant or person detained is not entitled thereto." In the Second Circuit, the practice has developed for the government to submit opposing affidavits, as it did here, to writ applications. The decisions below were not made upon the *application* alone,

as required, but by accepting the disputed facts alleged in the opposing affidavit. Accordingly no writ was issued and no hearing was held. This practice in the Second Circuit, violative of 28 U.S.C. 2243, drastically curtails the important writ of habeas corpus. It presents an unauthorized procedure which should be condemned by the Supreme Court.

Conclusion

The decision below is in conflict with decisions of this Court and with the views prevailing in other circuits. Whether courts may never go outside an official record to discover whether such official himself acted unlawfully on matters outside the record involves an important question of federal procedure and practice. Whether allegations upon information and belief are sufficient, whether disputed questions of fact may be resolved in habeas corpus proceedings without a hearing and whether courts may go outside the application in deciding whether to issue a writ are issues equally deserving of review. The decision below rendered by a divided court, enunciates novel principles of law which have not heretofore been approved by this Court nor by other circuits. For these reasons and for the reasons set forth in the dissent below, petitioner respectfully requests that a writ of certiorari be granted.

Respectfully submitted,

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(159)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 366

UNITED STATES OF AMERICA, EX REL. JOSEPH ACCARDI,

Petitioner,

vs.

EDWARD J. SHAUGHNESSY, District Director of the Immigration and Naturalization Service, New York District, Department of Justice

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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Citations

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The Court of Appeals affirmed the judgment of the District Court by a divided vote. The majority and dissenting opinions are reported at 206 F. 2d 897, and are set forth beginning at page 17 of the record. The District Court rendered no opinion.

Jurisdiction

The judgment of the Court of Appeals was entered on August 11, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). Certiorari was granted on November 16, 1953.

Questions Presented

1. Where an alien is entitled to a deportation hearing conforming to procedural due process, and the administrative record, submitted to the Court, does not reveal *on its face* that matters outside that record were considered or that the case was prejudged, is he precluded from alleging and proving that his hearing was infected with the unfair utilization of confidential information and with prejudgment of his case?

2. Does a petition for a writ of habeas corpus state a cause of action where it alleges unfairness in a deportation hearing by reason of the use of confidential information, prejudgment of the case, and treatment of petitioner, different from all aliens similarly situated?

3. Upon an application for a writ of habeas corpus, may the Court go beyond the application and resolve disputed questions of fact in favor of the government, without affording the petitioner a hearing upon such disputed issues?

Statutes and Regulations Involved

28 U. S. C. 2243 provides in part:

> "A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.
> • • • • •
> "Unless the application for the writ and the return

present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained."

Section 19(c) of the Immigration Act of 1917 [62 Stat. 1206; 8 U. S. C. 155 (c)], as amended provides in pertinent part as follows:

> "In the case of any alien (other than one to whom subsection (d) is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States to any country of his choice at his own expense in lieu of deportation, or (2) suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act."

The Seventh Proviso of Section 3 of the Immigration Act of 1917 as amended (39 Stat. 875-878, 8 U. S. C. 136) provides in part as follows:

> "Aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years may be admitted in the discretion of the Attorney General, and under such conditions as he may prescribe."

8 C.F.R. 150.7 (b) which was in force under the 1917 Immigration Act until November 10, 1950 provided in part as follows:

> "*Eligibility for departure in lieu of deportation or for suspension of deportation.* If the alien has applied for the privilege of departure in lieu of deportation or

for suspension of deportation * * * the presiding inspector shall follow his conclusions of law as to the alien's deportability with a discussion of the *evidence* relating to the aliens eligibility for such relief and his reasons for his proposed order. * * *"

8 C.F.R. 151.2 (c); 1951 Supp. reads in part:

"*Hearing officer: specific duties.* * * * the hearing officer shall thereafter present all available evidence, including the interrogation of the alien and all witnesses presented concerning * * * (4) factors bearing upon statutory eligibility for discretionary relief, * * *"

8 C.F.R. 151.5 (1951 Supp.) provides in part as follows:

"*Decision—(a) Preparation of written decision.* * * * the hearing officer shall, as soon as practicable after the conclusion of the hearing, prepare in writing a decision, signed by him, which shall set forth a summary of the evidence adduced and his findings of fact and conclusions of law as to deportability. If the alien has applied for relief from deportation, the decision shall also contain a separate determination as to whether or not the hearing officer is satisfied, on the basis of the evidence presented, as to the alien's statutory eligibility for the relief requested. * * * The hearing officer shall have no authority to exercise the Attorney General's powers under section 19 (c) (2) of the Immigration Act of 1917, as amended, or under the seventh proviso to section 3 of that act * * *".

Section 405(a) of Public Law 414 (66 Stat. 280), known as the Immigration and Nationality Act of 1952 provides:

"Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any * * * proceedings * * * done or existing at the time this Act shall take effect; but as to all such * * * proceedings * * * the statutes * * * repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. * * * An application for suspension of deportation under section 19 of the Immigration Act of 1917, as

amended, * * * which is pending on the date of the enactment of this Act, shall be regarded as a proceeding within the meaning of this subsection."

Statement

The petitioner seeks through this second application for a writ of habeas corpus to review the legality of a deportation order entered against him on April 3, 1953.

Petitioner asserts that he is a citizen of Italy, that he last entered the United States in 1932, and that he now has a residence of twenty-one years in the United States. He is married to a lawful resident of the United States, has a two year old American born child, and has been a person of good moral character for the past ten years (R. 2-3 Par. 2-7).

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(1) That the Attorney General maintains a confidential file relative to petitioner, that the government has included his name on a secret purge list, and that because of confidential information and other matters outside the record including the proscribed listing of his name by the Attorney General on October 2, 1952, petitioner was ordered deported in 1953. (R. 3-4 Par. 11-16).

(2) That the Attorney General decided to deport petitioner in October of 1952 and accordingly the case was prejudged in advance of the Board's decision of April 3, 1953. (R. 4 Par. 19).

(3) That notwithstanding the fact that the case was considered deserving of discretionary relief in 1945, and notwithstanding the fact that discretionary relief had been granted in all similar cases, it was denied in the instant case (R. 3 Par. 9-10).

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The Court of Appeals affirmed in a divided opinion (R. 17). The majority decision, following *Alexiou* v. *McGrath*, 101 F. Supp. 421 (D. C. Dist. of Col. 1951) and *U. S. ex rel Weddeke* v. *Watkins*, 166 F. 2d 369 (C.A. 2, 1948), acknowl-

edges that the Immigration Regulations (8 C.F.R. 150.7 (b)) required a due process hearing upon the exercise of discretion to suspend deportation and grant petitioner permanent residence. It further assumes that matters outside the record may not be considered but decides that judicial intervention is only warranted (1) where administrative officials acknowledge utilization of off-the-record material and prejudgment of a case upon the record or file submitted to the court and (2) where allegations of such facts are not made upon information and belief. The majority opinion concludes that the allegation that all similarly situated cases have been granted permanent residence, is not a provable fact.

The dissenting opinion of Judge Frank takes sharp issue with these conclusions. He states (R. 27):

> "There is no doctrine that a court may never go outside such an official record to discover whether an official himself unlawfully acted on matters outside the record. * * * Ours would be a sorry legal system if it completely shielded from attack a judge's or other official's order simply because the facts revealing its illegality are not in the official record on which the order purports to rest. To confer such immunity would be to make legality a matter of sheer ritualism, of mere outward looks. That way lies tyranny."

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Summary of Argument

1. The majority decision requires that administrative officials furnish evidence of their own improper conduct in their own decisions or in the particular file they choose to

lodge with the court. Upon their refusal so to do, as in the instant case where it is claimed that a due process deportation hearing was denied by utilization of confidential information, the majority below would deny judicial intervention. The dissenting opinion properly denies that this startingly novel doctrine has any acceptance in the democratic processes of administrative law or federal practice. It finds that this tyrannical concept is contrary to the spirit and principle of *Universal Oil Co.* v. *Root Refining Co.*, 328 U.S. 575,580 (1946).

2. The Court below considered insufficient assertions in the habeas corpus application alleged upon information and belief. The dissent properly observed that this traditional manner of alleging facts not within the pleader's personal knowledge had been approved by the Supreme Court and in other circuits. *Berger* v. *United States*, 255 U. S. 22, 34-35 (1921); *Kelly* v. *United States*, 250 Fed. 947, 948-9 (C.A. 9, 1918); *Creekmore* v. *United States*, 237 Fed. 743 (C.A. 8, 1916); See also: *Shaw* v. *Protane Corp.*, 1 F. Supp. 980 (W.D. Pa., 1932); *Midwest Mfg. Co.* v. *Staynew Filter Corp.*, 12 F. Supp. 876, 880 (W.D. N.Y., 1935).

3. The Court below improperly considered insufficient the allegations that discretionary relief had been favorably exercised in similar cases. Without a hearing, and in the face of the Government's denial which raised an issue of fact, it concluded that these allegations were not provable. Discriminatory action of this character is provable and petitioner should have been accorded a hearing to establish his allegations. *U. S. ex rel. Knauff* v. *Shaughnessy*, 181 F. 2d 839 (C.A. 2, 1950); *Holiday* v. *Johnston*, 313 U.S. 342 (1941).

4. The decision below also accepted as an established fact, and in the absence of a hearing, the government's denial of prejudgment and utilization of confidential information. This amazing principle suspends the great writ

of habeas corpus. It resolves all disputed questions of fact in favor of the government, without a hearing and without permitting parties to submit proof of their contentions, contrary to this court's decisions in *Price* v. *Johnston,* 334 U. S. 266 (1948); *Walker* v. *Johnston,* 312 U. S. 275 (1941); *Holiday* v. *Johnston,* 313 U. S. 342 (1941); *Waley* v. *Johnston;* 316 U. S. 101 (1942); and *Cochrane* v. *Kansas,* 316 U. S. 255 (1942) and contrary to 28 U. S. C. 2243.

ARGUMENT

The denial of the first writ herein was not res judicata. *Salinger* v. *Loisel,* 265 U. S. 224 (1924); *Wong Doo* v. *United States,* 265 U. S. 239 (1924).

Where the same grounds are urged in a second petition for habeas corpus, a court can refuse to rehear the matter. *U. S. ex rel McCann* v. *Thompson,* 144 F. 2d 604, 606 (C. A. 2, 1944). But where new grounds not previously urged are presented, or where the merits present a substantial question, the second petition has not been considered an attempt to abuse the great writ of habeas corpus. *U. S. ex rel McCann* v. *Thompson* (new grounds considered); *U. S. ex rel Gregoire* v. *Watkins,* 164 F. 2d. 137 C. A. 2, 1947 (Writ granted on fourth application); *Shaughnessy* v. *Mezei,* 195 F. 2 964, C. A. 2 1952, reversed 345 U. S. 206 (Writ issued on fifth application).

Moreover, where, as in the instant case, the merits are considered by the District Court in refusing to issue a writ, the merits rather than the court's discretion are presented for review in the appellate court. *Salinger* v. *Loisel,* 265 U. S. 224, at 232.

In the instant case, one may search the first petition for allegations about the use of confidential material, material outside the record, allegations that the case was prejudged or that discretionary relief had been granted in similar

cases. The first petition did not state a claim for relief. It was properly denied.

The present petition does state a claim for relief. The District Court, treating the opposing affidavit as a motion to dismiss, held (R. 15) that relator was not entitled to a hearing upon these new allegations. In this, we submit that it erred. Factual issues could not be resolved at such stage of the proceedings. In undertaking to decide questions of fact upon oral argument and in holding that a case was not alleged upon the merits for the issuance of the writ, the courts below were in error.

I

The Court of Appeals Erred in Its Refusal to Grant a Hearing upon the Claim of Improper Utilization of Matters Outside the Record.

It is now well settled that judicial review is appropriate where the Attorney General commits an error of law in exercising his discretion, *McGrath* v. *Kristensen*, 340 U. S. 162 (1950); *deKonig* v. *Zimmerman*, 89 F. Supp. 891 (E. D. Pa., 1950), or where he abuses his discretion, *Knauff* v. *Shaughnessy*, 181 F. 2d 839 (C. A. 2, 1950); *Mastrapasqua* v. *Shaughnessy*, 180 F. 2d 999 (C. A. 2, 1950; *U. S. ex rel Adel* v. *Shaughnessy*, 183 F. 2d 371 C. A. 2, 1950); *U. S. ex rel Ciannamea* v. *Neely*, 202 F. 2d 289 (C. A. 7, 1953); *Caddeo* v. *McGrathnery* 202 F. 2d 807 (C. A. D. C., 1953). See also: *Vergas* v. *Shaughnessy*, 97 F. Supp. 335 (S. D. N. Y. 1951).

The petition herein alleges that confidential matters outside the record were utilized in deciding to deny discretionary relief herein, that the Attorney General had prepared a list of one hundred undesirables [on oral argument (R. 15)

respondent admitted that petitioner was on this list], and that the case was prejudged before decision by the Board of Immigration Appeals on April 3, 1953 (R. 3-4, Par. 11-20).

It is submitted that petitioner should have an opportunity to prove these allegations. If they are true, then there has been an unlawful exercise of discretion.

In opposing certiorari, the Government denied that the Court below held "that an administrative record fair on its face can never be attacked" (Brief in Opposition, p. 9). The opinion below does not support this view. Petitioner's interpretation is also the view of the dissenting member of the Court of Appeals (R. 26-27). The Court below said (R. 20-22) that the charges in the petition:

> "* * * were categorically denied in an opposing affidavit which also incorporated by reference the administrative record. There is absolutely nothing in that record to indicate that the administrative officials considered anything outside the record. * * * As this court said in *United States ex rel. Kaloudis v. Shaughnessy*, 180 F. 2d 489, 490, an alien has no privilege of inquiring into the grounds on which the Attorney General has denied suspension of deportation; 'unless the ground stated is on its face insufficient, * * *.' In this respect the case at bar is unlike *Alexiou* v. *McGrath* (D. C. D. C.), 101 F. Supp. 421, where it affirmatively appeared that evidence not of record was considered on the issue of eligibility for suspension of deportation."

If this language conveys any meaning at all, it is that an administrative record fair on its face, can never be attacked by proof that improper and illegal considerations motivated the denial of suspension of deportation. Petitioner proceeds on this assumption.

(A) Evidence Dehors the Record May Be Shown to Establish a Denial of Due Process

Judge Frank, properly observes (R. 24) that by "a valid regulation, having the effect of a law, the Attorney General has provided that one who applies for discretionary relief under the statute shall receive a hearing before the Board of Immigration Appeals on his appeal from a decision adverse to the applicant, made by the Commissioner or Acting Commissioner. * * * If it can be shown that, as the relator alleged in the second petition for habeas corpus, the decision adverse to discretionary relief in *Accardi's* case was made by the Attorney General in 1952 before Accardi had had a Board hearing (in 1953), so that the purported Board hearing was but a sham, then it will appear that discretion has not been exercised as required by regulation. * * * My colleagues say that 'there is absolutely nothing in the record to indicate that the administrative officials considered anything outside the record.' But the same was true in the *Root Refining* case (328 U. S. 575) * * *. Moreover, relief by habeas corpus inherently involves judicial reliance on facts not in the record supporting the judgment which habeas corpus collaterally attacks."

We submit that Judge Frank's analysis and criticism of the majority opinion below is sound and irrefutable. Petitioner was entitled to a due process hearing pursuant to regulations which had the force and effect of law. *Bridges* v. *Wixon*, 326 U. S. 135, 153 (1945). To support his allegations that he was not accorded the hearing before the Board of Immigration Appeals which applicable regulations require, he could go outside the administrative record.

Evidence dehors the record is admissible to set aside a fraudulent judgment. *Bindczyck* v. *Finucane*, 342 U. S.

76 (1951); *Universal Oil Co.* v. *Root Refining Co.*, 328 U. S. 575 (1946); *United States* v. *Throckmorton*, 98 U. S. 61 (1878). If an alien were denied counsel or the right to call witnesses in his own defense against threatened deportation, there can be no doubt that evidence dehors the record could be searched to establish such due process denial. See *Kwock Jan Fat* v. 253 U. S. 455 (1920). Proof dehors the record is traditionally considered acceptable to show lack of due process in criminal cases. *Waley* v. *Johnston*, 316 U. S. 101, 104 (1942); *Cockrane* v. *Kansas*, 316 U. S. 255 (1942); *Price* v. *Johnston*, 334 U. S. 266 (1948); *Holiday* v. *Johnston*, 313 U. S. 342 (1941); *Walker* v. *Johnston*, 312 U. S. 275 (1941). It is evident that an administrative record in a deportation case is no more sacrosanct than a criminal adjudication. The novel and unusual doctrine of the court below should not be permitted to stand.

(B) *The Immigration Regulations Preclude Consideration of Matters Outside the Record*

In the case of *Marion Alexiou*, III, I & N Dec. 714 at page 716, the Board of Immigration Appeals stated in a case like the instant one where matters outside the record were presented for consideration of discretionary relief:

> "An alien who is charged with being subject to deportation is accorded a hearing before an immigrant inspector, known as the Presiding Inspector, to determine, whether he is subject to deportation as charged (8 C. F. R. 150.6 (a), (b). The Presiding Inspector is required to apprise the alien, *inter alia*, of his right to apply for suspension of deportation, if found deportable (8 C. F. R. 150.6(c)). At any time during the hearing the alien may give notice that he wishes to apply for such suspension (8 C. F. R. 156.6(g)). At the conclusion of the hearing the Presiding Inspector prepares a memorandum setting forth a summary of the evidence, his proposed findings of fact and con-

clusions of law and a proposed order respecting deportation (8 C. F. R. 150.7(a)(c)). If the alien has applied for suspension of deportation, the Presiding Inspector includes in his memorandum a discussion of the evidence relating to the alien's eligibility for such relief and states in numbered paragraphs his proposed findings of fact and conclusions of law with respect to such eligibility (8 C. F. R. 150.7(b)).''

''The foregoing regulations have the force and effect of law and are binding upon the Immigration and Naturalization Service (*Bilokumsky* v. *Tod*, 263 U. S. 149, 155, 68 L. ed. 221, 224, 44 S. Ct. 54; *Bridges* v. *Wixon*, 326 U. S. 135, 153, 89 L. ed. 2103, 2114, 65 S. Ct. 1443; *Matter of J——*, A-4691768, Sept. 26, 1949). They impose a duty upon the Government to grant a fair hearing to an alien on the issue of his deportability (*The Japanese Immigrant Case*, 189 U. S. 86, 100-101, 47 L. ed. 721, 726; *U. S. ex rel Vajtauer* v. *Commissioner*, 273 U. S. 103, 106, 71 L. ed. 560, 563, 47 S. Ct. 302; *Whitfield* v. *Hanges* 222 F. 745, 749). They likewise impose a duty to accord a fair hearing to an alien on the issue of discretionary relief.''

On November 16, 1949 the Attorney General approved the Board's decision. On December 17, 1949 without any explanation, the Attorney General reversed. III, I & N Dec. 718.

Thereafter, the case was taken into the District Court for the District of Columbia where the Attorney General's reversal was disapproved. Judge Youngdahl in *Alexiou* v. *McGrath*, 101 F. Supp. 421 (Dist. of Col., 1951) ruled as follows at page 424:

''Once the Attorney General has established the procedure affording an opportunity for a fair hearing as has been done here, then I do not believe his discretion can be exercised arbitrarily or capriciously in complete disregard of what appears on the record. These proceedings were infected with unfairness by a considera-

tion of matters outside the record. Any action based on such an unfair hearing is a nullity. If that were not so then we would be injecting into our own system of government the very principles of totalitarianism which we are today struggling to strike down." * * *

"The hearing on eligibility for suspension is tainted, *ab initio*, with unfairness, because evidence not of record was considered. But for that evidence it is wholly speculative whether the requisite finding would have been made. See *Bridges* v. *Wixon*, *supra*. The charge of lack of due process cannot be avoided by a subsequent attempt at compartmentalization."

Deportation proceedings must be fair and consideration of *evidence* for discretionary relief is an integral part of the deportation hearing.

The administrative proceedings herein were instituted on October 21, 1947 (Appendix p. 32) and were therefore controlled by the Immigration Act of 1917 (8 U. S. C. 155-c-2) and the regulations promulgated thereunder (66 Stat. 280).

The regulations under the 1917 Immigration Act provided that the hearing officer should set forth in his opinion "a discussion of the *evidence* relating to the alien's eligibility for such relief (departure in lieu of deportation or suspension of deportation) and of his reasons for his proposed order." 8 C. F. R. 150.7(b); 1949 ed. Under a 1950 amendment to the regulations, it was specifically provided that the hearing officer should "present *all available evidence* * * * concerning * * statutory eligibility for discretionary relief" [8 C. F. R. 151.2(c); 1951 Supp.]. "If the alien has applied for relief from deportation, the decision (of the hearing officer) shall also contain a separate determination as to whether or not the hearing officer is satisfied, *on the basis of the evidence presented*, as to the alien's statutory eligibility for the relief requested" 8 C. F. R. 151.5 (a); 1951 Supp.

If the alien is not granted discretionary relief, he is deported. Ever since *Kwock Jan Fat* v. *White*, 253 U. S. 455 (1920), it has been held that only matters of record must be considered, if a deportation hearing is to avoid the charge of unfairness.

Moreover the courts have almost uniformly assumed that only matters of record can sway discretion in deportation hearings.

In *U. S. ex rel Weddeke* v. *Watkins*, 166 F. 2d 369 (C. A. 2, 1948; cert. denied 333 U. S. 876) it was said:

> "Since the regulations of the Attorney General have set up a quasi-judicial procedure for the determination of issues bearing on the propriety of exercising his power to suspend deportation under 8 U. S. C. A., section 155(c), we assume that the alien is entitled to procedural due process in the conduct of such hearing, and we assume further that, if the Immigration Service issues a warrant of deportation without according the alien such procedural due process, the warrant can be challenged on this ground in habeas corpus proceedings."

Arakas v. *Zimmerman*, 200 F. 2d 322, 324 (C. A. 3, 1952) states: "We agree entirely with the holding in *Alexiou* v. *McGrath*, D. C. 1951, 101 F. Supp. 421 • • •".

In *U. S. ex rel Giacalone* v. *Miller*, 86 F. Supp. 655, 657 (S. D. N. Y. 1949) Judge Rifkind overruled whatever contrary opinion he might have expressed in *U. S. ex rel Von Kleczkowski* v. *Watkins*, 71 F. Supp. 429 (S. D. N. Y. 1947). In the *Giacolone* case, Judge Rifkind stated:

> "• • • It is now accepted that procedural due process must be observed in a hearing even though the alien is invoking relief which is, in any event afforded only at official discretion. See *United States ex rel. Weddeke* v. *Watkins*, 2 Cir. 1948, 166 F. 2d 369, 371, certiorari denied 1948, 333 U. S. 876, 68 S. Ct. 904, 92 L. Ed. 1152;

Kavadias v. *Gross*, D. C. N. D. Ind. 1948, 82 F. Supp. 716, 718."

Kavadias v. *Cross*, 82 F. Supp. 716, (N. D. Ind. 1948; reversed upon other grounds, 177 F. 2d 497) followed the rule of *U. S. ex rel Weddeke* v. *Watkins, supra*, that discretion must be exercised upon the evidence of record.

In the instant case, it is true as asserted by the Court below that the Board's decision does not state that confidential information was employed. But failure to mention it does not establish the point one way or the other. Petitioner can establish by documentary evidence that the Board of Immigration Appeals considers that petitioner is a racketeer. (See *infra*, Point II). The record of the administrative hearing and the Board's decision do not establish such conclusion but on the contrary affirmatively establish that petitioner has been for ten years and is now a person of good moral character. (Appendix, herein p. 34).

There was confidential information not of a security nature available to the Board,—this is undenied. If it was utilized, and that is the issue, it was used improperly. There is no point in having a hearing before the Board of Immigration Appeals, if its mind is made up in advance upon matters outside the record. Petitioner is entitled to a hearing to establish whether the Board acted improperly and contrary to regulations which have the force and effect of law.

(C) *Congress Did Not Authorize Utilization of Matter Outside the Record.*

In *U. S. ex rel Kaloudis* v. *Shaughnessy*, 180 F. 2d 489, 491 (C.A. 2, 1950) which did not involve matters outside the record, the Court observed that review of discretion was appropriate where its denial was "actuated by consideration that Congress could not have intended to make relevant."

Significantly, where Congress intended that matters outside the record be utilized it specifically authorized it or authorized regulations permitting its use. Such is the case of exclusions without a hearing. 8 U.S.C. 1225(c); *Knauff* v. *Shaughnessy*, 338 U. S. 53 (1950); *Shaughnessy* v. *Mezei*, 345 U. S. 206 (1953). Such is the case of detention of alien enemies who are not entitled to a hearing. *Ludecke* v. *Watkins*, 335 U. S. 160 (1948). However, where a hearing is authorized—and this is so even in the case of arriving aliens, it must be a fair hearing on record evidence. *Johnson* v. *Tertzag*, 2 F. 2d 40, 42 (C. A. 1, 1924); *U. S. ex rel., Brandt* v. *District Director*, 40 F. Supp. 371 (S. D. N. Y. 1941); Immigration and Naturalization Service *Monthly Review*, February, 1947, p. 101.

From 1917 until the *Alexiou* case in 1949 the statute and regulations herein were interpreted to require determinations of discretion to be made upon record evidence. This long standing administrative practice and contemporaneous interpretation is entitled to great weight. *United States* v. *American Trucking Association*, 310 U. S. 534, 549 (1940); *Billings* v. *Truesdale*, 321 U. S. 542, 552 (1944). It reflected the will of Congress when the 1917 Immigration Act and its 1940 amendment (54 Stat. 671, providing for suspension of deportation) were enacted. It is therefore submitted that this Court should affirm the doctrine enunciated in *U. S. ex rel. Weddeke* v. *Watkins, supra* and *Alexiou* v. *McGrath, supra*.

II

The Court of Appeals Erred in Holding Insufficient Allegations upon Information and Belief

In the District Court, the Government opposed the instant application for a writ of habeas corpus on the merits (R. 5). In the Court of Appeals, the same course was pursued. At

no time did the Government object to the fact that allegations of the complaint were made upon information and belief. Nevertheless, the majority of the Court of Appeals, held that "the assertion of a mere suspicion or 'belief' that the Board considered other matters did not require the issuance of a second writ" (R. 23). Here again, the Government in opposing certiorari, attempts to dilute the holding below, by the claim that the "majority does not hold, as petitioner claims (Pet. 8) that issues of fact may never be raised in a petition for habeas corpus by allegations on information and belief" (Brief p. 9). Here too, the dissenting member of the Court of Appeals confirms petitioner's interpretation. Judge Frank states (R. 29):

> "Finally, I disagree with my colleagues when they say that no attention may be paid to the allegations of secret prejudgment by the Attorney General because it is made on information and belief. * * * In a variety of circumstances, it has been held that such an allegation suffices where, as here, the asserted facts are thus not within affiant's personal knowledge."

(A) *Petitioner's Information and Belief.* The District Judge herein asserted that the existence of a confidential purge list was just one of counsel's ideas but a moment later Government counsel admitted the existence of the list and the fact that petitioner's name was included therein. (R. 15). The Court of Appeals in turn, asserted that prejudgment of the case on this ground was improperly alleged as a mere "suspicion". We submit that the facts of prejudgment are alleged positively and sufficiently in conformity with the cases noted below. We further submit that documentary proof will sustain the allegations of the petition.

On April 3, 1953, the Board of Immigration Appeals stated (Appendix p. 34 herein) as follows with reference to the petitioner:

> "Affidavits of persons well acquainted with the alien, *character investigation by the Service,* and the testimony of four witnesses placed in this proceeding *establish that the alien is considered a person of good moral character.* (Emphasis supplied).

This is what the record evidence establishes according to petitioner's file lodged with the Court. The Department of Justice, however, does not consider the petitioner a person of good moral character, but on the contrary have been free in describing him as a "nationally known racketeer" and "hoodlum". (Significantly, petitioner's name will not be found in the Kefauver Report, *Senate Report 307,* 82d Cong. 1st Sess.)

Professor Konvitz, in his recent book, *Civil Rights in Immigration,* (1953) observes: "That there are special drives against these persons (the foreign born) ought to be apparent to anyone who reads the newspapers" (p. 110). The background of this case can best be understood in the light of this current deportation drive. The public announcements of the Attorney General and the Department of Justice reports to the American public, like reports of government agencies to Congress (*United States* v. *Penn Foundry & Mfg. Co.,* 337 U. S. 198, 216; 1949) are appropriate subjects of judicial notice. There follows a chronological summary of pertinent public announcements of the Department of Justice as reflected in their official press releases:

> *October 2, 1952:* The Attorney General announces his special drive to deport alien racketeers.
>
> *April 3, 1953:* Announcement of Board of Immigration Appeals order of deportation against Joseph Accardi "known as a New Jersey racketeer". This action was taken "under the current denaturalization and deportation program of Attorney General Brownell against top racketeers and subversives."
>
> *April 20, 1953:* Announcement of apprehension of

Joseph Accardi, "Newark, N. J. racketeer" for deportation on April 24, 1953.

May 11, 1953: Announcement of denial by Board of Immigration Appeals of motion by Joseph Accardi, "Newark, New Jersey racketeer, for reopening of his deportation case."

May 20, 1953: Release of speech of May 19, 1953 by Attorney General Brownell before the Stark County Division, Ohio Republican Finance Committee Dinner at Canton, Ohio. At page 8 of speech, the Attorney General stated:

"But here are a few examples of the thousands of decisions and actions the Department of Justice may be called upon to make in a single day: * * * to initiate deportation proceedings against undesirables like Joseph Accardi * * * ".

September 29, 1953: Deputy Attorney General Rogers announces at the Annual Conference of District Directors of the Immigration and Naturalization Service that the number of racketeers against whom deportation and denaturalization proceedings have been brought has increased from 96 to 131.

October 30, 1953: Address of Assistant Attorney General in charge of the Criminal Division before the Chicago Crime Commission (pp. 10-11):

"The second area is one in which the Department of Justice has not only primary but exclusive jurisdiction —the field of denaturalizing and deporting gangsters and racketeers, who are foreign born and who because of their criminal activities, can make no claim to remain in the United States while violating its laws.* * * To name but a few of the nationally known hoodlums who are the object of the program * * * Joe Accardi * * * and Joe Adonis of New York, have * * * been ordered deported."

Professor Konvitz properly notes that "in the long run these drives against aliens and foreign born citizens have an evil effect upon the administration of justice" *Civil Rights in Immigration, supra,* p. 125. William Shannon,

in his series of articles which began in the New York Post on October 19, 1953 states in the same vein:

> "Almost every day Attorney General Brownell announces the deportation of some alleged subversive or underworld figure. This great 'cleanup drive'—it began before the Republicans took over, but they really went to town with it—seems likely to chalk up a higher box score than that of A. Mitchell Palmer during the 'red scare' days of 1919-20.
>
> "When the clatter of the mimeograph machines in Brownell's busy press office occasionally quiets down, however, it becomes clear that many innocent persons, some of them humble and friendless, have been trapped in Brownell's legal machinery."

We submit that when the proofs are in, it will be shown that Joseph Accardi was and is, in fact, a person of good moral character as found by the Board of Immigration Appeals and that he is one of the innocents caught in the current deportation drive. The anxiety of the Department of Justice to deport a racketeer [1] made petitioner the object of a hoax equalled by that of the Piltdown man and "The Man Who Wouldn't Talk".

(B) *Sufficiency of Allegations Upon Information and Belief.* At the outset, one may well question the propriety of the action of the Court below in raising, *sua sponte*, the issue of the sufficiency of the allegations of the petition asserted upon information and belief. New issues may not be raised for the first time upon appeal. *Blair* v. *Oesterlein Mach. Co.*, 275 U. S. 220, 225 (1927): *United States* v. *Hillcrest Inv. Co.*, 147 F. 2d 194, 196 (C. A. 8, 1945). Objections in appellate courts which would dispose of a case on a tech-

[1] On April 27, 1953 the New York Times prematurely reported that Joseph Accardi was the first racketeer deported under the current deportation drive, and on September 23, 1953 Drew Pearson criticized the Department of Justice because it had only deported two criminals out of 133 in eight months.

nicality of pleading are not favored. *Mitchell* v. *Wright*, 154 F. 2d 924, 926 (C. A. 6, 1946; cert. denied, 329 U. S. 733). This is especially true where as here, if the petition contained mere allegations of suspicion, it could have been amended to set forth positive assertions as counsel intended. This Court has appropriately commented that a "petition for habeas corpus ought not to be scrutinized with technical nicety. Even if it is insufficient in substance it may be amended in the interest of justice." *Holiday* v. *Johnston*, 313 U. S. 342, 350 (1941). However, it is submitted that the petition did assert facts in a positive and proper manner. Pleadings under our present form of simplified practice are required to allege the ultimate facts which a plaintiff must prove in order to establish his case. *Mum* v. *Decker & Sons*, 301 U. S. 168 (1937). Their function in a lawsuit is to inform the court and adverse parties of the facts in issue so the court may declare the law and adversaries may know what to meet by proof. *Twachtman* v. *Connelly*, 106 F. 2d 501, 505 (C. A. 6, 1939). Rule 8 of the Rules of Civil Procedure, requiring merely a "plain statement of the claim" was intended to avoid technicalities. "Under the new rules it is very difficult for counsel to draft a pleading so badly as to lose the rights of his clients". Barron & Holtzoff, *Federal Practice and Procedure*, Volume 1, pp. 415-416, 431-432. The Court below, nevertheless, stressed a technicality in the pleading.

Under Rule 24(a) of the Rules of the Southern District of New York, habeas corpus petitions in immigration cases must be verified by the petitioner or a person authorized to act for the alien. Obviously, such individuals can not always have personal knowledge of the facts which underlie the claim for relief. The problem is illustrated by *Berger* v. *United States*, 255 U. S. 22, 34-35 (1921). Defendants in a criminal trial filed an affidavit of prejudice, pursuant to

Section 21 of the Judicial Code (36 Stat. 1090), alleging that they were of German birth and upon information and belief that Judge Kenesaw Mountain Landis had made anti-German statements and was therefore prejudiced against Germans. In upholding the sufficiency of these allegations, this Court said:

> "We concede that § 21 is not fulfilled by the assertion of 'rumors or gossip', but such disparagement cannot be applied to the affidavit in this case. Its statement has definite time and place and character, *and the value of averments on information and belief in the procedure of the law is recognized.* To refuse their application to § 21, would be arbitrary and make its remedy unavailable in many, if not in most cases. The section permits only the affidavit of a party * * *. * * * it cannot be the assumption of § 21 that the bias or prejudice of a judge in a particular case would be known by everybody and necessarily, therefore, to deny to a party the use of information received from others is to deny to him at times the benefit of the section." (Emphasis supplied.)

Similarly in *McQuillen* v. *National Cash Register Co.*, 22 F. Supp. 867 (D. C. Md., 1938), a stockholder's complaint containing allegations upon information and belief was held sufficient. The Court said at page 876:

> "Furthermore, while, as a general rule, whatever is essential to the right of the complainant to maintain a bill in equity is necessarily within his knowledge, and therefore ought to be alleged not on information and belief, but positively and with precision; nevertheless, this requirement presupposes that the facts are known to the plaintiff personally. In any case, therefore, where the matters are not within the knowledge of the plaintiff, he may allege the facts on information and belief, because clearly no rule of pleading should be permitted to defeat the right of a person to sue merely because he is lacking in personal knowledge of *all* of the

facts and may not be able to swear that *all* essential facts were known to him. See Leavenworth v. Pepper, C. C., 32 F. 718; Murray Company v. Continental Gin Company, C. C., 126 F. 533; Helmet Company v. Wrigley Company, 6 Cir., 245 F. 824; Moore v. New York Cotton Exchange, 2 Cir., 296 F. 61, affirmed in 270 U. S. 593, 46 S. Ct. 367, 70 L. Ed. 750, 45 A. L. R. 1370; Boyd v. Nebraska ex rel. Thayer, 143 U. S. 135, 146, 181, 12 S. Ct. 375, 36 L. Ed. 103. We conclude that the allegations in the present bill of complaint satisfy the requirements of Equity Rule 25, since the transactions complained of are peculiarly within the knowledge of the defendants rather than of the plaintiffs."

Allegations upon information and belief have been held sufficient in actions for contempt, *Kelly* v. *United States*, 250 Fed. 947, 948 (C. A. 9, 1918); *Creekmore* v. *United States*, 237 Fed. 743 (C. A. 8, 1916); *Emery* v. *State*, 78 Neb. 547 (1907); *Hughes* v. *Territory*, 10 Ariz. 119, 127 (1906); *State ex rel. Porter* v. *First Judicial District*, 123 Mont. 447, 456 (1950); for negligence, *Shaw* v. *Protane Corp.*, 1 F. Supp. 980 (W. D. Pa., 1932); *Reed* v. *Mai*, 171 Kan. 169 (1951); *Colton* v. *Foulkes*, 259 Wisc. 142, 146 (1951); for patent infringement, *Wyckoff et al.* v. *Wagner Typewriter Co.*, 88 Fed. 515 (S. D. N. Y., 1898); *Elliot & Hatch Book Typewriter Co.* v. *Fisher Typewriter Co.*, 109 Fed. 330 (S. D. N. Y., 1901); *Murray Co.* v. *Continental Gin Co.*, 126 Fed. 533 (C. C. Del., 1903); *Midwest Mfg. Co.* v. *Staynew Filter Corp.*, 12 F. Supp. 876, 880 (W. D. N. Y., 1935; for unfair competition, *Helmet Co.* v. *Wm. Wrigley, Jr., Co.*, 245 Fed. 820, 824 (C. A. 6, 1917); for libel, *Pridonoff* v. *Balokovich*, 36 Cal. 2d 788, 792 (1951); for fraud, *Wells* v. *Bridgeport Hydraulic Co.*, 30 Conn. 316, 323 (1862) and in other forms of equitable proceedings, *Nance* v. *Daniel*, 183 Ga. 534, 538 (1936); *Allen* v. *Allen*, 196 Ga. 736, 747, 748 (1943); *Drener* v. *Mercantile Trust & Deposit Co.*, 115 Ala. 592, 560 (1896).

It is submitted that if allegations upon information and belief are proper in this variety of situations including a charge of bias against a judge, then allegations of denial of due process by the Attorney General may likewise be made upon information and belief especially where the facts of prejudgment and the existence of a confidential purge list are peculiarly within his knowledge, and not within the personal knowledge of petitioner.

III

The Court of Appeals Erred in Holding Insufficient Allegations That Discretionary Relief Had Been Granted in All Similar Cases.

The majority of the Court below (R. 23) and the Government in its brief in opposition to certiorari (p. 10) claim insufficient the allegations of the petition (R. 3, Par. 8) that in all similar cases involving persons of good moral character, with long residence and family ties in the United States, discretionary relief had been extended. It is asserted that this allegation is not a provable fact.

(A) *Lack of Findings.* The administrative file herein will disclose, that the hearing officer, the Assistant Commissioner, and the Board of Immigration Appeals merely concluded, without disclosing the basis therefor, that discretion should not be exercised favorably. Nowhere is the basis for the denial of discretionary relief explained in the Board's decision. Moreover, the regulations contemplate findings upon the subject of discretion. 8 C.F.R. 150.7(b).

In *S.E.C.* v. *Chenery Corp.*, 318 U.S. 80, at 94, (1943) the Supreme Court said:

> ". . . the orderly functioning of the process of review requires that the *grounds upon which the administrative agency acted be clearly disclosed and adequately sustained.*" (Emphasis supplied.)

In *Florida* v. *United States*, 282 U.S. at 215 (1931) this Court said:

> "The question is not merely one of the absence of elaboration or of a suitably complete statement of the grounds of the Commission's determination, * * * but of the lack of the basic or essential findings required to support the Commission's order. In the absence of such findings, we are not called upon to examine the evidence as to what it shows or to spell out and state such conclusions of fact as it may permit. The Commission is the fact-finding body and the court examines the evidence not to make finds for the Commission but to ascertain whether its findings are properly supported."

See also: *Beaumont, S. L. & W. R. Co.* v. *United States*, 282 U.S. 74 (1930); *United States* v. *Interstate Commerce Commission*, 198 F. 2d 958 (C.A.D.C., 1952); *Davis, Administrative Law* (1951) p. 561.

In failing to disclose the basis for its decision on discretionary relief, the Board of Immigration Appeals acted contrary to law.

(B) *Conduct in Similar Cases.* Paragraph 8 of the petition herein (R. 3) alleges that in "all similar cases the Board of Immigration Appeals has exercised favorable discretion and its refusal to do so herein constitutes an abuse of discretion." This is borne out by the test applied to these cases in decisions of the Board of Immigration Appeals.

It is undisputed that the Board of Immigration Appeals had power to grant permanent residence to petitioner either by ordering suspension of deportation [8 U.S.C. 155(c)(2)] or through a procedure known as seventh proviso and preexamination (8 U.S.C. 136; 8 C.F.R. 142; *Matter of Sam and Sarra C.* —, I-, I & N Dec. 525; *Matter of A.* —, II, I & N Dec. 459.) The factors to be considered in the grant of discretion in cases like that presented here, are enunciated by

the Board of Immigration Appeals in *Matter of L.* —, III, I & N Dec. 767 at 770. They are:

> "(1) Whether there has been genuine reformation;
> (2) The family ties of the alien in the United States;
> (3) The seriousness of the crime or crimes to be waived under the seventh proviso; and
> (4) The period of residence of the alien in the United States."
>
> See also: *Matter of V.* —, III, I & N Dec. 571.

The record of the administrative hearing herein shows (1) reformation and good moral character for ten years; (2) that the relator has a wife and two-year-old child here; (3) that his conviction was not serious, especially in view of the suspended sentence given to him; (4) that he has a twenty-one year residence here.

That the respondent denies petitioner's allegation does not conclude the issue. It is a matter of proof and should be established or refuted at a hearing which the District Court denied to the petitioner.

The allegation clearly states a claim for relief. In *U. S. ex rel Knauff* v. *Shaughnessy*, 181 F. 2d 839 (C.A. 2, 1950), the court said:

> "8 U.S.C.A. § 154 gives the Attorney General discretion to determine when immediate deportation is not * * * proper'. By the adoption of an 'invariable practice', he has established a class of situations with respect to which he has always so exercised that discretion as to suspend deportation. That classification is entirely reasonable. To depart from it in a single instance is to act arbitrarily or capriciously, to abuse administrative discretion."

The court's ruling, *supra*, was confirmed by Justice Jackson who granted a stay to Ellen Knauff, 182 F. 2d 1020. Justice Jackson's unreported opinion (set forth in The Ellen Knauff Story, pp. 152, 154) states:

> "Nothing has been produced to show why this particular petitioner should be so discriminated against (deported pending judicial review). To stand between the individual and arbitrary action by the Government is the highest function of this Court."

It is submitted, that under the allegations of the petition, petitioner should be allowed to show that respondent acted arbitrarily herein and abused his discretion.

IV

Petitioner Is Entitled to a Hearing

The decision below is in direct conflict with the mandate of 28 U. S. C. 2243 which requires that an application for a writ should be signed or entertained "Unless it appears from the *application* that the applicant or person detained is not entitled thereto." In the Second Circuit, the practice has developed for the government to submit opposing affidavits, as it did here, to writ applications. The decisions below were not made upon the *application* alone, as required, but by accepting the disputed facts alleged in the opposing affidavit. Accordingly no writ was issued and no hearing was held. This practice in the Second Circuit, violative of 28 U. S. C. 2243, drastically curtails the important writ of habeas corpus. It presents an unauthorized procedure which should be permitted to stand.

The decision below accepted as an established fact, and in the absence of a hearing, the government's denial of prejudgment and utilization of confidential information. It also decided without any proof or hearing, that petitioner's allegation that his case was treated differently from all similar cases, was not a provable fact. This amazing principle suspends the great writ of habeas corpus. It resolves all disputed questions of fact in favor of the government,

without a hearing and without permitting parties to submit proof of their contentions.

In *Price* v. *Johnston*, 334 U. S. 266, 291 (1948) this Court observed: "Appellate Courts cannot make factual determinations which may be decisive of vital rights where the crucial facts have not been developed." To the same effect as to requirements of a hearing on disputed facts are: *Walker* v. *Johnston*, 312 U. S. 275, 285, 287 (1941); *Holiday* v. *Johnston*, 313 U. S. 342, 350 (1941); *Waley* v. *Johnston*, 316 U. S. 101 (1942); *Cochrane* v. *Kansas*, 316 U. S. 255; (1942); *Stewart* v. *Overholzer*, 186 F. 2d 339, 342 (C. A. D. C., 1950). The doctrine applies even though the appellate court might, as did the majority below, consider the allegations improbable or incapable of proof. *Holiday* v. *Johnston, supra, Waley* v. *Johnston, supra.*

Petitioner should be granted a hearing, as Judge Frank indicated (R. 29) so that he may have an opportunity to prove the allegations of his claim.

Conclusion

If the fate of the petitioner alone were to be decided by this case, it would be of small moment. Hysteria impels people to destroy the very thing they are struggling to preserve. The hysteria whipped up by the Department of Justice in this case, should not permit us to lose sight of the democratic way that administrative agencies should function. The power of the Attorney General over resident aliens

> "is a power to be administered, not arbitrarily or *secretly*, but fairly and openly under the restraints and principles of free government applicable where the fundamental rights of men are involved, regardless of their origins or race. It is the province of the courts, in proceedings for review * * * to prevent abuse of this extraordinary power, * * * " *Kwock Jan Fat* v. *White*, 253 U. S. 454,464 (1920).

To prevent abuse of the Attorney General's extraordinary powers over the lives and destinies of our foreign born, judicial intervention is appropriate herein. Petitioner should be accorded a hearing to permit him to establish his charges. The decision below should be reversed with directions that the writ of habeas corpus issue.

Respectfully submitted,

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APPENDIX

DECISION OF BOARD OF IMMIGRATION APPEALS

File: A-4373872—New York. April 3, 1953

In re: JOSEPH ACCARDI OR GIUSEPPE ACCARDI.

In Deportation Proceedings.

In Behalf of Respondent: Herbert C. Smith, Esq., 1122 South Orange Avenue, Newark 6, New Jersey. (Heard November 26, 1952.) (Three other persons—respondent and relatives.)

CHARGES:

Warrant: Act of 1924—no immigration visa.

Lodged: Act of 1917—sentenced for crime committed within 5 years after entry, to wit: Conspiracy to defraud the U. S. (18 U.S.C. 88).

APPLICATION:

Suspension of deportation—economic detriment; or voluntary deportation, preexamination and the discretion contained in the 7th Proviso.

DETENTION STATUS:

Released under Bond.

This record relates to a 42-year-old alien, native and citizen of Italy, whose last and only entry to the United States occurred at Buffalo, New York during the month of August 1932, at which time he entered this country to remain permanently. He was not in possession of an unexpired immigration visa. The warrant of arrest was issued October 21, 1947 and, after appropriate hearing, the alien was found deportable on the charge in the warrant of arrest. The proceedings were reopened by the Assistant Commissioner on January 28, 1952, to receive further evidence concerning the application for discretionary relief.

The reopened hearing was accorded in April 1952, after which the Hearing Officer denied discretionary relief and entered an order for deportation on the charge in the warrant of arrest. On July 7, 1952, the Acting Assistant Commissioner considered the case, denied discretionary relief,

ordered deportation solely on the charge in the warrant of arrest, and certified the case to this Board for final decision.

No issue is raised in this case relative to deportability which is solely on the charge in the warrant of arrest. The charge lodged in the proceedings is not sustained. This charge was predicated on the conviction of the alien in 1941 for conspiracy to defraud the United States in violation of Title 18, U.S.C. 88, which overt acts occurred between January 1934 and January 1937. The alien received a suspended sentence of 24 months.

This record shows that this alien was granted the privilege of preexamination on April 6, 1945. Thereafter, the American Consul at Montreal, Canada declined to consider his application for an immigration visa because of the alien's conviction for conspiracy to defraud. As previously stated the warrant of arrest was issued on October 21, 1947.

Counsel has appeared in oral argument and has insisted that there is no positive proof of any acts of misconduct on the part of this alien during the past five years, that should operate to preclude the granting of discretionary relief.

This alien has been living in the United States for a period of 21 years. He is married to a legally resident alien and has one infant child born in this country in 1951. The spouse and child are dependent on the alien for support. It is stated that the alien's spouse is a petitioner for naturalization.

The respondent alleges that he is worth between $15,000 and $20,000 (p. 22-a). Evidentiary data in the record is to the effect that the subject has been engaged in the sale or transfer of real estate and has received some income in the nature of commissions on the sales. The alien has testified that he is part owner of certain properties some of which he is trying to sell. He also owns a farm equipped with machinery and stocked with livestock, worth about $40,000. He receives a salary of $130 per month for collecting rents for his sister-in-law and about $100 per month for collecting rents on other properties.

The record shows that the father of this alien came to the United States in 1939, and thereafter conveyed assets or property of the value of $50,000 to his daughter-in-law as gifts. This alien alleges that he has supported his father

since 1946. During the period since the date last mentioned, at least, the alien has claimed his father as a dependent in income tax returns. The alien offers as an explanation the excuse that his father is unable to maintain himself due to ill health.

Affidavits of persons well acquainted with the alien, character investigations by the Service and the testimony of four witnesses placed in this proceeding establish that the alien is considered a person of good moral character. The facts stated by the character witnesses have been discussed by the Hearing Officer in his decision. As previously stated, the alien has been the subject of warrant proceedings during the past 5 years.

This respondent has been arrested on several occasions between 1933 and 1940 or 1941. He was arrested in 1933 and charged with being a disorderly person; in 1934 for possession of lottery chips and violation of the liquor laws, respectively; and in 1940-1941 for conspiracy to defraud the United States which acts were committed between 1934 and 1937.

Relief from deportation is a matter of administrative discretion and not a matter of right. This alien has been in the United States several years, and although he was granted preexamination in 1945, he has been unsuccessful in the adjustment of his immigration status. After consideration of all the facts and circumstances in the case, we believe that the applications for relief should be denied as a matter of administrative discretion.[2]

Order: It is ordered that the alien's applications for discretionary relief be denied.

It is further ordered that the decision of the Hearing Officer in this case which was adopted and certified to this Board for final decision by the Assistant Commissioner on January 28, 1953, be and the same is hereby affirmed.

——— ———,
Chairman.

[2] *U. S. ex rel. Weddeke* v. *Watkins*, 166 F. 2d 369; and *Kaloudis* v. *Shaughnessy*, 180 F. 2d 489.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 366

UNITED STATES OF AMERICA, EX REL. JOSEPH ACCARDI,

Petitioner,

vs.

EDWARD J. SHAUGHNESSY, District Director of the Immigration and Naturalization Service, New York District, Department of Justice

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 366

UNITED STATES OF AMERICA, EX REL. JOSEPH ACCARDI,

vs. *Petitioner,*

EDWARD J. SHAUGHNESSY, District Director of the Immigration and Naturalization Service, New York District, Department of Justice

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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1. Consideration of Matters Dehors the Record

The basic fallacy of respondent's argument is the assumption that because press releases were issued subsequent to the decision of the Board of Immigration Appeals, considerations outside the record did not motivate the Board (Brief p. 36). It should first be observed that the Hearing Officer's decision of May 15, 1952 (Immigration File p.

160) was only a recommendation. The Assistant Commissioner's decision of July 7, 1952 was likewise tentative since the case was certified to the Board for final action. Thus the Board's decision was the only one which could be dispositive herein. The petition for a writ alleges that on October 2, 1952—prior to the Board's decision—a secret purge list containing petitioner's name was circulated to the Board and that because of this listing petitioner could not secure fair consideration or reconsideration of his case (R. 3-4, par. 13-18). Nowhere is any claim made that the Board was unaware of this racketeer listing before the administrative decision herein. If known to the Board, as contended, its influence on a decision is obvious.

It is evident that since the preparation of this list on October 2, 1952, petitioner has been considered a racketeer by the Department of Justice. No opportunity has been afforded him, however, to show that such accusation is false. Significantly, when petitioner sought a stay in this Court before Mr. Justice Jackson and when he sought and secured release upon bail by the full Court, the respondent did not come forward to oppose such applications upon the ground that petitioner was a nationally known hoodlum or racketeer. If proof to that effect was available, as an officer of the Court, the Attorney General should have been duty-bound to disclose it. In any event, whether considerations dehors the record motivated the Board is a question of fact which should not be resolved by an appellate court but should be left to a hearing on the writ. Such hearing will not improperly require a probe of the mental process of executive officers. In *Ohio Bell Tel. Co.* v. *Public Utilities Commission*, 301 U. S. 292 (1937) and *United States* v. *Abilene & S. R. R. Co.*, 205 U. S. 274 (1924) this Court had no hesitancy in declaring hearings unfair where matters outside the record were considered. In fact, the *Second Morgan* case [*Morgan* v. *United States*, 304 U. S. 1

(1938)] does not forbid such declaration. There this Court said at pages 18-19:

> "* * * we agree with the Government's contention that it was not the function of the court to probe the mental processes of the Secretary in reaching his conclusion, *if he gave the hearing which the law required* * * *. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command." (Italics supplied.)

2. The Board's Opinion

The Government now seeks to show that suspension of deportation was denied petitioner by the Board for three reasons: (1) A suspended sentence conviction for conduct in 1934—twenty years ago, (2) Inability to fully explain his income and (3) Claim of father as a dependent (Brief p. 29). A reading of the Board's opinion, set forth in the appendix to petitioner's main brief does not confirm this. The opinion contains in detail petitioner's assets and income without any comment. It notes that petitioner claimed his 78 year old ill father as a dependent after 1946. The administrative record discloses that in 1943 and 1944 the father conveyed his assets to a daughter-in-law for investment in real estate. (Immigration File pp. 43-45). Thereafter petitioner secured income from collecting rents from this real estate investment and supported his father (Board's Opinion)—an arrangement which is understandable. No evidence whatsoever was adduced to show that Internal Revenue disapproved the claim of dependency. The 20 year old crime for which he was given a suspended sentence conviction alone mars petitioner's record. The cases are legion where old offenses even of a more serious character have been held no bar to discretionary relief.

Matter of Henderson, File 56208/353 (Conspiracy to defraud); *Matter of DaSilva*, File A6054739 (Perjury and Forgery); *Matter of Gagne*, File 3934172 (Impairing morals of a minor); *Matter of Javellana*, File A1403830 (Manslaughter); *Matter of Hansen*, File 1452036 (Theft). *Matter of Marlinson*, 56171/297 (Armed robbery). The reason discretion was refused herein was not disclosed in the Board's opinion but in later Press Releases. It was the unfounded and unsupported belief of the Board that petitioner was a nationally known hoodlum and racketeer.

3. Right to a Fair Hearing

The Court below assumed that in view of the regulations, procedural due process required a hearing upon the record evidence in a case where suspension is sought (R. 22). It cited *Alexiou* v. *McGrath*, 101 F. Supp. 421 (Dist. of Col., 1951) with approval as had the Third Circuit in *Arakas* v. *Zimmerman*, 200 F. 2d 322 (C. A. 3, 1952).

Although the Government has not cross-appealed or sought certiorari to attack this conclusion, it now seeks to do so. It did not attack this ruling in the courts below and may not raise the issue for the first time in this Court. So too, with regard to the statement of petitioner's counsel that confidential information might be utilized. Such statement was made on October 8, 1951 prior to the recommended decision of the Hearing Officer of May 15, 1952. It was made without knowledge that any off the record matter had been utilized as it was coupled with the statement that "no evidence presented including certain reports of officers of the Immigration and Naturalization over the course of three years, relative to outside investigations, has been detrimental to the respondent" (Immigration File p. 163). This last sentence is omitted from the government's quotation at page 25. It reveals no waiver. A waiver requires knowl-

edge of the facts [*Albert* v. *Martin Customs Made Tires*, 116 F. 2d 962 (C. A. 2, 1941)]. Here there was no knowledge in 1951—prior to the Board's decision—that adverse confidential information was available or that it had been utilized. On the contrary, respondent disclaims its use but asserts an advance waiver—if such a waiver without knowledge be possible.

The regulations quoted at page 41 of the Government's brief (8 C. F. R. 150. 7-150. 13) have nothing to do with this case. They concern an application for suspension made prior to the deportation hearing. They grant an alien the *benefit* of disclosable material (8 C. F. R. 150. 9). That is far different from the utilization of confidential information against him. The fact is that 8 C. F. R. 150 is a title concerned with procedures at the time of investigation or arrest. 8 C. F. R. 151 (1951 Ed.), the title with which we are here concerned relates to "Deportation Proceedings: Hearing and Adjudication." 8 C. F. R. 151. 5 (1951 Ed.) as did the predecessor section, 8 C. F. R. 150. 7(b) (1949 Ed.) requires that evidence on discretionary relief be taken at the deportation hearing. And evidence relates only to that which is introduced as such. *United States* v. *Abilene & S. R. R. Co.*, 265 U. S. 274, 288 (1924). Obviously, there would be little point to regulations which require evidence on issues if such issues are to be disposed of upon the basis of confidential information.

The issue in a deportation hearing, to be sure, is whether an alien is deportable—but there is also the issue as to whether he should be permitted to stay here. Perhaps the latter phase is a matter of grace and a privilege indeed, but it is inextricably woven into the deportation hearing itself.

There is only one deportation hearing. In recognition of this, the entire hearing has been for years conducted as a single unit upon the record evidence. Since 1940, Congress

has been aware of the fact that suspension of deportation has been granted or denied upon record evidence. The Department of Justice has rendered reports of suspension cases to Congress twice monthly when it has been in session. (See House Document 541, 77th Cong. 2d Sess.) The amendment of the law in 1948 (62 Stat. 1206) without changing the hearing practice indicates Congressional approval of the hearing procedure in suspension cases. *Mogis* v. *Lyman-Richey Sand & Gravel Corp.*, 189 F. 2d 130, 140 (C. A. 8, 1951).

Indeed, the statute here, 8 U. S. C. 155(c)(2) requires the Attorney General to make findings on discretionary relief and findings contemplate record evidence as a basis. Such has been the interpretation of Congress. In summarizing existing law on suspension of deportation, Senate Report 1515, 81st Congress, 2nd Session, states at page 599:

> "On the basis of the *evidence presented*, the presiding inspector prepares a memorandum of his findings, conclusions, and recommendations, a copy of which is furnished the alien or his attorney." (Italics supplied.)

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 366

UNITED STATES OF AMERICA, EX REL.
JOSEPH ACCARDI, PETITIONER

v.

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE, NEW YORK DISTRICT, DEPARTMENT OF JUSTICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The majority and dissenting opinions in the court below (R. 17-29) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on August 11, 1953 (R. 30). The petition for a writ of certiorari was filed on September 23, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether issues of fact requiring a hearing were raised by a petition for habeas corpus which attacked the validity of the denial of petitioner's application for the discretionary relief of suspension of deportation on the ground that, on information and belief, the case had been prejudged before the final decision of the Board of Immigration Appeals, where that decision on its face was based on the facts of record and previous recommendations adverse to petitioner had been made on the facts of record before the acts alleged to constitute prejudgment had occurred.

STATUTE INVOLVED

Section 19(c) of the Immigration Act of 1917, as amended (62 Stat. 1206; 8 U.S.C., Supp. V, 155(c)), provides in pertinent part as follows:

> In the case of any alien (other than one to whom subsection (d) is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States to any country of his choice at his own expense, in lieu of deportation; or (2) suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b)

that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act.

STATEMENT

Petitioner seeks review of a judgment of the Court of Appeals for the Second Circuit, affirming the dismissal of a second petition for habeas corpus, brought by petitioner after he had been taken into custody for deportation, in which he attacked the validity of the denial of his application for the discretionary relief of suspension of deportation.

Petitioner admittedly entered the United States illegally in 1932, without immigration inspection and without an immigration visa. His deportability on such grounds is not contested. The petition for habeas corpus here involved relates only to the denial of his claim for discretionary relief.

In the District Court, the respondent filed an affidavit in opposition to the granting of the petition for a writ of habeas corpus, and annexed thereto a copy of the immigration file in petitioner's case which is presently being lodged with the Clerk of this Court. From that file the following facts appear.

Deportation proceedings against petitioner were instituted in 1947 on the ground that he had entered illegally. In 1948, petitioner applied for suspenison of deportation, claiming that his departure would result in serious economic detriment to his father. Those proceedings were reopened by reason of the

decision of this Court in *Sung* v. *McGrath*, 339 U.S. 33.

Petitioner was accorded a new hearing in 1951, after which the hearing officer found him deportable on the basis of his illegal entry. The hearing officer found that petitioner's conviction in 1941 for conspiracy to defraud the United States in the years from 1934 to 1937 did not constitute grounds for deportation since petitioner had been given a suspended sentence for such offense.

The hearing officer also considered petitioner's application for suspension of deportation, founded by then on the claim that deportation would result in economic hardship to his legally resident alien wife whom he had married in 1949 and to the child which they were expecting in October, 1951. The hearing officer found as follows:

> The respondent testified that he pays $50.00 a month for rent of an apartment in the apartment house where he now resides. He receives $100.00 a month as caretaker of the apartment house. He also receives $50.00 a month plus dividends from property owned by him and another person. The record is silent as to the amount of the dividend. The respondent stated his assets consist of about thirty per cent stock in the TEAC Homes Company, which property is valued at about $5000.00. The other stockholders in this company are the respondent's brother and his wife, and another person. The respondent also owns one-half interest in a piece of property which he says is worth about

> $3000.00 at today's real estate value. Respondent and his wife own a 243 acre farm on which there is a house, farm buildings, livestock, and farm machinery having a total value of $32,000.00 on which $10,000 was paid in cash. He places his total assets at between $40,000.00 and $50,000.00.

On the basis of these facts the hearing officer stated "A careful consideration of the evidence adduced during the hearing is not sufficiently convincing to satisfactorily indicate source of income of the respondent, nor the total amount of such income." He recommended that the discretionary relief of suspension of deportation be denied.

At petitioner's request, on January 28, 1952, the hearings were ordered reopened to permit him to produce witnesses and documentary proof of his assets and liabilities. Additional hearings were held on April 16 and April 30, 1952. Petitioner did not produce an accountant's statement of his assets and liabilities, claiming that his accountant had been unable to prepare such a statement because of the death of the accountant's father. The hearing officer ruled that petitioner had had ample time to have the statement prepared and declined further to adjourn the hearings. Petitioner did, however, himself testify at the adjourned hearings, and there claimed that his assets amounted only to about $15,000 to $20,000. On May 15, 1952, the hearing officer again recommended that suspension of deportation be denied. He pointed out that, although petitioner testified that since 1941 he had supported

his 78-year-old father and in his income tax returns since 1946 had claimed the father as a dependent, and although the father had testified in 1948, in connection with petitioner's application for suspension of deportation at that time, that the father had no assets, the evidence showed that during the years 1943 and 1944, the father had made gifts to Theresa Accardi (the wife of petitioner's brother) totaling more than $50,000.

On July 7, 1952, the Assistant Commissioner concurred in the recommendation for denial of suspension, pointing out the discrepancy as to the father's assets, and the doubts as to petitioner's sources of income. He concluded that "In view of all the circumstances regarding his sources of income, his assets, and his manner of earning a living, together with his previous arrest record and his conviction record, it is indicated that relief from deportation is not justified in this case * * *."

On April 3, 1953, the Board of Immigration Appeals concurred in the denial of the application for relief. The opinion summarizes the facts of record, including the following facts with respect to petitioner's income:

> The respondent alleges that he is worth between $15,000 and $20,000 (p. 22-r). Evidentiary data in the record is to the effect that the subject has been engaged in the sale or transfer of real estate and has received some income in the nature of commissions on the sales. The alien has testified that he is part owner of certain properties some of which he

> is trying to sell. He also owns a farm equipped with machinery and stocked with livestock, worth about $40,000. He receives a salary of $130 per month for collecting rents on other properties.

The board concluded that "After consideration of all the facts and circumstances in the case, we believe that the applications for relief should be denied as a matter of administrative discretion."

In the second petition for habeas corpus, the one here involved, filed by petitioner's wife on his behalf, it was alleged that the denial of discretionary relief was invalid for the reason that, on information and belief, the Attorney General on October 8, 1952, had prepared a confidential list of persons to be deported and the inclusion of petitioner's name on that list was based on confidential information outside the record. The petition alleged that by reason thereof the Board of Immigration Appeals had prejudged petitioner's case and based its determination against him on matters outside the record. There was also an offer to show that in all similar cases, aliens had been granted discretionary relief. (R. 2-5.) In a sworn affidavit submitted in opposition to the application for the issuance of the writ, an Assistant United States Attorney denied that petitioner's case had been prejudged or that the case had been considered on evidence outside the record. He also pointed out that petitioner's first application for a writ had been sued out on the eve of his scheduled departure and that the second writ was sued out just before the

petitioner was scheduled for deportation on May 19, 1953 (R. 5-8).

The District Court declined to issue the writ (R. 2), and the Court of Appeals, Judge Frank dissenting, affirmed the order of the District Court (R. 30). The majority of the court below pointed out that all decisions in the case adverse to petitioner except the decision of the Board of Immigration Appeals had been rendered before the statement of the Attorney General on which the petition was based; that the opinion of the Board of Immigration Appeals "discusses only the evidence in the record, and such evidence was amply sufficient to support discretionary denial of suspension of deportation" (R. 22). The majority concluded that "the assertion of a mere suspicion or 'belief' that the Board considered other matters did not require the issuance of a second writ. Were this enough, every deportable alien would so allege, merely to delay his justifiable deportation." (R. 23.) The majority were also of the view that the allegations of the petition that "in all similar cases" the Board had exercised its discretion in favor of deportable aliens convicted of crime was completely without merit since "determination of what weight to give to a prior conviction of crime necessarily depends upon the circumstances of the particular case. No two cases can be precisely similar." (R. 23.)

ARGUMENT

By isolating various factors mentioned by the majority of the court below in their decision, peti-

tioner is endeavoring to present issues of law which are not really present in this case. The majority does not hold, as petitioner claims (Pet. 8), that issues of fact may never be raised in a petition for habeas corpus by allegations on information and belief. Nor does it hold that an administrative record fair on its face can never be attacked or that administrative denial of alleged facts will always preclude inquiry into the charges made (see Pet. 7-8). The majority opinion holds that, in this case, where the evidence of record so amply supports the conclusion reached, where decisions adverse to petitioner had been made on the evidence of record by both the hearing officer and the Assistant Commissioner before the compilation of the list on which the charge of prejudgment and consideration of matters outside the record is based, where the subsequent finding of the Board of Immigration Appeals shows on its face that it is based on facts of record, it takes something more than general charges on information and belief, made in a second petition for habeas corpus, to raise an issue of fact requiring a hearing as to the validity of the denial of an application for discretionary relief which is at best granted as of grace and not of right. It is on the totality of the situation as revealed by the record, and not on any one isolated factor that the majority below reached the conclusion that the petition presented no issue of fact requiring a hearing.

Equally valid is the holding of the court below that the allegations that petitioner was treated

differently from other aliens similarly situated presented no issue of fact requiring a hearing. The administrative decision denying discretionary relief was obviously not based merely on the fact that petitioner had been previously convicted of crime. It was based on the total impression created by the fact of previous conviction of crime, the discrepancies as to the father's assets, the lack of preciseness as to the source of petitioner's assets, the difficulties in reconciling his testimony as to his earnings with the evidence of substantial wealth. Manifestly no other case, much less all other cases of aliens once convicted of crime, could present all these factors in the same degree. The allegation here involved is not, as in the cases relied upon by petitioner (Pet. 9), one which, while improbable on its face, is capable of being determined. The allegation here on its face presents no issue which is capable of proof.

Nor was there any impropriety in the procedure by which the District Court reached the conclusion, affirmed on appeal, that the petition presented no issues requiring a hearing. The majority opinion below did not, as petitioner claims, reach its conclusion "by accepting the disputed facts alleged in the opposing affidavit" (Pet. 10). As pointed out above, the effect of the majority opinion below is that, in view of the undisputed facts of record, i.e., that certain decisions had been rendered by the various administrative officers, petitioner's general allegations on information and belief were insufficient to raise an issue. The fact that in the oppos-

ing affidavit the allegations of prejudgment were denied was adverted to, but was not necessary to the decision. It is on the weakness of petitioner's allegations in the light of the record, rather than on the strength of the respondent's denials, that the decision below rests.

The procedure of ascertaining the facts of record before determining whether a petition for habeas corpus should issue was sanctioned by this Court in *Walker* v. *Johnston,* 312 U.S. 275, 284. This Court there said:

> It will be observed that if, upon the face of the petition, it appears that the party is not entitled to the writ, the court may refuse to issue it. Since the allegations of such petitions are often inconclusive, the practice has grown up of issuing an order to show cause, which the respondent may answer. By this procedure the facts on which the opposing parties rely may be exhibited, and the court may find that no issue of fact is involved. In this way useless grant of the writ with consequent production of the prisoner and of witnesses may be avoided where from undisputed facts or from incontrovertible facts, such as those recited in a court record, it appears, as matter of law, no cause for granting the writ exists. On the other hand, on the facts admitted, it may appear that, as matter of law, the prisoner is entitled to the writ and to a discharge. This practice has long been followed by this court and by the lower courts. It is a convenient one, deprives the petitioner of no substantial right, if the

petition and traverse are treated, as we think they should be, as together constituting the application for the writ, and the return to the rule as setting up the facts thought to warrant its denial, and if issues of fact emerging from the pleadings are tried as required by the statute.

It was because no issue of fact emerged when the petition was considered in relation to the record, that the petition was properly refused.

CONCLUSION

The decision below is correct and presents no conflict of decisions. It relates only to the particular factual situation presented by all the circumstances in this case. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

ROBERT L. STERN,
Acting Solicitor General.
WARREN OLNEY, III,
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BEATRICE ROSENBERG,
Attorney.

OCTOBER, 1953.

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In the Supreme Court of the United States

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EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE, NEW YORK DISTRICT, DEPARTMENT OF JUSTICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals (R. 18–29) are reported at 206 F. 2d 897.

JURISDICTION

The judgment of the Court of Appeals was entered on August 11, 1953 (R. 30). The petition for a writ of certiorari was filed on September 23, 1953, and granted on November 16, 1953. The

jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether issues of fact requiring a hearing were raised by a petition for habeas corpus which attacked the validity of the denial of petitioner's application for the discretionary relief of suspension of deportation, alleging on information and belief that the case had been prejudged and decided on matters outside the record by the Board of Immigration Appeals, where that decision on its face was based on the facts of record and previous recommendations adverse to petitioner had been made on the facts of record before the acts alleged to show prejudgment had occurred.

STATUTES AND REGULATIONS INVOLVED

These are set forth in the Appendix, *infra*, pp. 52–59.

STATEMENT

In a second petition for habeas corpus, petitioner, after he had been taken into custody for deportation, attacked the validity of the denial of his application for suspension of deportation (R. 2–5). Petitioner admittedly entered the United States illegally in 1932, without immigration inspection and without an immigration visa, and his deportability on these grounds is not con-

tested (I. R. 5, 8).[1] The petition for habeas corpus thus relates only to the denial of the discretionary relief in the form of suspension of deportation which the Attorney General is authorized to grant subject to approval by Congress.

In the District Court, the respondent filed an affidavit in opposition to the granting of the petition for a writ of habeas corpus, and annexed thereto a copy of the immigration file in petitioner's case (R. 5–8). From that file the following facts appear (see note 1, *supra*):

Petitioner was convicted in 1941 of conspiring to defraud the United States during a period beginning about two years after his entry (I. R. 14, 15, 209). Deportation proceedings against petitioner were instituted in 1947 on the ground that he had entered illegally (I. R. 3, 186). In 1948, petitioner applied for suspension of deportation, claiming that his departure would result in serious economic detriment to his father (I. R. 205–207).

Following the decision of this Court in *Sung v. McGrath,* 339 U. S. 33, the proceedings begun in 1947 were reopened and a new hearing was held in August, 1951 (I. R. 4, 121). At the con-

[1] We have numbered in pencil on the lower left-hand side of the pages the immigration file in petitioner's case, which was before the courts below and is lodged with the Clerk of this Court. References to this file will be designated as "I. R.". "R." refers to the printed record.

clusion of the new hearing, the hearing officer found petitioner deportable on the basis of his illegal entry (I. R. 4, 159, 164). The hearing officer also considered petitioner's application for suspension of deportation, founded by then on the claim that deportation would result in economic hardship to his legally resident alien wife whom he had married in 1949 and to the child they were expecting in October, 1951. The hearing officer found as follows (I. R. 160):

> The respondent testified that he pays $50.00 a month for rent of an apartment in the apartment house where he now resides. He receives $100.00 a month as caretaker of the apartment house. He also receives $50.00 a month plus dividends from property owned by him and another person. The record is silent as to the amount of the dividend. The respondent stated his assets consist of about thirty per cent stock in the TEAC Homes Company, which property is valued at about $5,000.00. The other stockholders in this company are the respondent's brother and his wife, and another person. The respondent also owns one-half interest in a piece of property which he says is worth about $3,000.00 at today's real estate value. Respondent and his wife own a 243 acre farm on which there is a house, farm building, livestock, and farm machinery having a total value of $32,000.00 on which $10,000 was paid in

cash. He places his total assets at between $40,000.00 and $50,00.00.

The hearing officer found that "careful consideration of the evidence adduced during the hearing is not sufficiently convincing to satisfactorily indicate source of income of the respondent, nor the total amount of such income." He concluded "that the evidence does not justify or warrant the granting of any discretionary relief in this case." (I. R. 160.)

At petitioner's request, on January 28, 1952, the hearings were ordered reopened to permit him to produce witnesses and documentary proof of his assets and liabilities (I. R. 4, 22). Additional hearings were held on April 16 and April 30, 1952 (I. R. 23, 60). Petitioner did not produce an accountant's statement of his assets and liabilities, claiming that the statement had not been prepared because of the death of the accountant's father. The hearing officer ruled that petitioner had had ample time to have the statement prepared and declined further to adjourn the hearings. Petitioner did, however, testify himself at the adjourned hearings, and there claimed that his assets amounted only to about $15,000 to $20,000. (I. R. 22, 28, 62–64, 65, 110.) On May 15, 1952, the hearing officer again recommended that suspension of deportation be denied (I. R. 22). He pointed out that, although petitioner testified that since 1941 he had supported his

78-year old father and in his income tax returns since 1946 had claimed his father as a dependent, and although the father had testified in 1948, in connection with petitioner's application for suspension of deportation at that time, that the father had no assets, the evidence showed that during the years 1943 and 1944, the father had made gifts to Theresa Accardi (the wife of petitioner's brother) totaling more than $50,000. (I. R. 20, 52–53, 114.)

In his exceptions to the hearing officer's decision, petitioner wrote (I. R. 163):

> That it is acknowledged that relief from deportation is not a right of any applicant but is a matter of discretion within the province of the Attorney General and to be exercised by him, and that he may consider evidence and information which may not be of record in order to properly arrive at a decision upon an action for discretionary relief. However, no evidence presented, including certain reports of officers of the Immigration and Naturalization Service, over the course of three years, relative to outside investigations, has been detrimental to the respondent.

On July 7, 1952, the Assistant Commissioner denied suspension of deportation, pointing out the discrepancy as to the father's assets and the doubts as to petitioner's sources of income. He concluded that "In view of all the circumstances regarding his sources of income, his assets, and

his manner of earning a living, together with his previous arrest record and his conviction record, it is indicated that relief from deportation is not justified in this case * * *." (I. R. 14–17.)

On April 3, 1953, the Board of Immigration Appeals concurred in the denial of the application for relief (I. R. 10–12). The opinion summarizes the facts of record, including the following facts with respect to petitioner's income (I. R. 11):

> The respondent alleges that he is worth between $15,000 and $20,000 (p. 22–r). Evidentiary data in the record is to the effect that the subject has been engaged in the sale or transfer of real estate and has received some income in the nature of commissions on the sales. The alien has testified that he is part owner of certain properties some of which he is trying to sell. He also owns a farm equipped with machinery and stocked with livestock, worth about $40,000. He receives a salary of $130 per month for collecting rents for his sister-in-law and about $100 per month for collecting rents on other properties.[2]

The Board concluded: "After consideration of all

[2] The opinion also states:

"This respondent has been arrested on several occasions between 1933 and 1940 or 1941. He was arrested in 1933 and charged with being a disorderly person; in 1934 for possession of lottery chips and violation of the liquor laws, respectively; and in 1940–1941 for conspiracy to defraud the United States which acts were committed between 1934 and 1937." (I. R. 11.)

the facts and circumstances in the case, we believe that the applications for relief should be denied as a matter of administrative discretion." (I. R. 12.)

The District Court in an order of May 15, 1953, dismissed petitioner's first application for a writ of habeas corpus to review the Board's denial of discretionary relief. In its memorandum opinion the court held: "A review of the record as a whole, fails to demonstrate that there was present a clear abuse of discretion or a clear failure to exercise discretion. Absent either element this court cannot review the exercise of discretion by the Board of Immigration Appeals."

In the second petition for habeas corpus, the one here involved, filed by petitioner's wife on his behalf, it was alleged that the denial of discretionary relief was invalid for the reason that, on information and belief, the Attorney General, on October 2, 1952, had prepared a confidential list of persons to be deported on which petitioner's name was included. The petition alleged that because of this "and because of consideration of matters outside the record of his immigration hearing," the Board of Immigration Appeals denied petitioner's application for discretionary relief. There was also an offer to show that in all similar cases, aliens had been granted discretionary relief. (R. 2–5.) In a sworn affidavit submitted in opposition to the application for the issuance of the writ, an Assistant United

States Attorney denied that petitioner's case had been prejudged or that the case had been considered on evidence outside the record. He also pointed out that petitioner's first application for a writ had been sued out on the eve of his scheduled departure and that the second writ was sued out just before the petitioner was scheduled for deportation on May 19, 1953 (R. 5–8).

The District Court declined to issue the writ (R. 2), and the Court of Appeals, Judge Frank dissenting, affirmed the order of the District Court (R. 30). The majority of the court below pointed out that all decisions in the case adverse to petitioner except the decision of the Board of Immigration Appeals had been rendered before the statement of the Attorney General on which the petition was based; that the opinion of the Board of Immigration Appeals "discusses only the evidence in the record, and such evidence was amply sufficient to support discretionary denial of suspension of deportation" (R. 22). The majority concluded that "the assertion of a mere suspicion or 'belief' that the Board considered other matters did not require the issuance of a second writ. Were this enough, every deportable alien would so allege, merely to delay his justifiable deportation." (R. 23.) The majority were also of the view that the allegations of the petition that "in all similar cases" the Board had exercised its discretion in favor of deportable aliens

convicted of crime was completely without merit since "determination of what weight to give to a prior conviction of crime necessarily depends upon the circumstances of the particular case. No two cases can be precisely similar." (R. 23.)

SUMMARY OF ARGUMENT

Admittedly deportable, petitioner sought the suspension of deportation the Attorney General has discretion to grant. It is only the denial of this discretionary relief which was in issue. The case turns on the allegation that in October, 1952—after a hearing officer had recommended, and the Assistant Commissioner had decided, that suspension of deportation should be denied, but before the Board of Immigration Appeals reached the same conclusion—the Attorney General announced a drive to deport undesirable aliens, including petitioner, who were here illegally. On this basis, and because statements emanating from the Department of Justice after the Board's decision in April, 1953, described petitioner as a racketeer and an undesirable, petitioner alleged that his application was prejudged on matters outside the administrative record. We submit that the courts below properly refused to review or revise the exercise of the Attorney General's discretion.

I

Congress provided that where a deportable alien meets the statutory conditions precedent the

Attorney General "may"—not "must"—grant suspension of deportation. The statutory language, the legislative history, and the consistent interpretations of Congress and the courts leave no doubt that this discretionary power is a matter of grace, like the pardoning power. If its exercise is reviewable at all, it is only for failure to exercise discretion or for the clearest abuse. No such ground is present here.

II

The general allegation that matters outside the record had been considered rests ultimately on the speculative assertion that, because the Attorney General performed his duty of prosecuting deportation proceedings against him, petitioner could not receive the benefit of a discretionary determination as to whether his deportation should be suspended. On this record, at least, the allegation posed no issue warranting a hearing. Moreover, reliance by the Attorney General in exercising his discretion on matters outside the record would not in any event invalidate the administrative decision.

A. The hearing officer and the Assistant Commissioner, whose decisions were rendered before the October, 1952, statement of the Attorney General on which petitioner's case rests, decided on the record that suspension of deportation was unwarranted. Though its ruling followed the October statement, the Board of Immigration Ap-

peals, agreeing with the two prior judgments, also referred only to the record. And the record amply justified the conclusion that petitioner was unworthy of suspension of deportation.

On the other hand, petitioner's allegation that outside matters were considered by the Board rested, in the last analysis, on the fact that the Department of Justice (as is its duty) prosecuted the deportation proceeding against him and that his case was considered important within the Department in the belief that he was a racketeer. The inference rests on the premise that the Attorney General cannot be trusted both to prosecute deportation proceedings and to determine in his discretion whether suspension of deportation should be granted. The premise is faulty, however; Congress, in a judgment which is not open to revision here, conferred both functions on the Attorney General.

Once this is acknowledged, petitioner's case falls. For his controverted allegations on information and belief come down to the conjecture that, because the proceedings against him were brought under the Attorney General and expedited in the belief that he was an undesirable alien, the Board of Immigration Appeals must have acted on this belief in denying suspension of deportation. Petitioner calls, then, for examination of the mental state of the Board—and perhaps of the Attorney General, who, petitioner says, has peculiar knowledge of the facts alleged—

to determine whether this matter outside the record accounts for the decision. Such an inquiry into the process of administrative judgment could scarcely ever be justified. Cf. *United States* v. *Morgan,* 313 U. S. 409, 421–422. Here, considering the nature of the allegations, the character of the discretionary decision involved, and the entire adequacy of the administrative record alone to support the decision, the probe petitioner sought in further delay of his long-delayed deportation was properly denied.

B. The statute giving the Attorney General power to suspend deportation places no restrictions on the mode of exercise of that power. It does not even require a hearing. It cannot be read to preclude reference by the Attorney General to matters outside a record of hearing in exercising his discretion.

Nor has the Attorney General by his regulations denied himself this power which Congress left him. The regulations applicable to petitioner's case clearly contemplated that undisclosable records might be relevant and could be considered in determining an application prior to the deportation hearing for suspension of deportation. While the regulations accord the alien a hearing on the application for suspension when the issue of deportability is heard, they nowhere forbid the Attorney General's reference to undisclosable information in making his ultimate determination.

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To hold otherwise is to read a crippling self-imposed restriction into the regulations. Congress, well knowing the Attorney General's access to information which must sometimes remain confidential in the public interest, trusted his judgment in dispensing clemency to deportable aliens. If that judgment, based on matters the Attorney General believes should remain undisclosed, is against clemency, the Attorney General is under a duty to act upon it. Petitioner's contentions would require the Attorney General either to suspend deportation, contrary to his judgment, or disclose information he deems confidential, contrary to his duty.

III

The controverted allegation that his application for suspension was "prejudged," except to point up the fact that what he seeks is a probe of the mental processes of the Board and the Attorney General, adds nothing to petitioner's case. The allegation rests solely upon the announcement in October, 1952, of a drive against aliens, including petitioner, believed to be racketeers. It amounts ultimately to a bare reassertion that the Attorney General, though he is charged with both functions, cannot conclusively exercise his discretionary suspension power in the case of an alien against whom he has brought deportation proceedings.

IV

The allegation that deportation had been suspended in "similar cases" stated no provable fact requiring a hearing. Judgment as to whether discretionary relief should be granted turns on the individual facts of each case. It would be neither proper nor fruitful to undertake to appraise the thousands of cases in which suspension has been granted or denied to determine whether some nonexistent rule of mechanical application had been followed in this case.

ARGUMENT

It should be emphasized at the outset that, as the court below stated (R. 19), there is in this case no issue as to the validity of the administrative proceeding insofar as it relates to the determination that petitioner is subject to deportation as an alien who entered the United States illegally. The question here involved relates only to the discretionary relief of suspension of deportation, a matter of grace and not of right. Petitioner's allegations must be considered in the light of the fact that what he seeks is in effect an exercise of the pardoning power of the executive. This power, it must be remembered, has been confided by Congress to the Attorney General's discretion. We think the very nature of the discretion involved precludes the kind of search petitioner proposes beyond the record into the minds of the

Attorney General and his delegates. Moreover, the proposal is particularly ill-conceived in this case where, long before the existence of the departures from the record he alleges, petitioner acknowledged the Attorney General's power to refer to matters outside the record in exercising his discretion.

It is important, too, that the facts of this case, and their chronology, be focused clearly in defining the issues presented. It bears emphasis that the hearing officer who ruled that petitioner should be deported, and that suspension of deportation should be denied, rendered his decision in May of 1952, months before the statement of the Attorney General upon which petitioner predicates his case. Petitioner does not—he could not—question that the hearing officer's determination was an objective conclusion that petitioner's record, including a conviction for conspiring to defraud the United States within two years after his illegal entry and highly suspicious financial affairs thereafter, afforded no basis for the dispensation of discretionary relief from deportation. Similarly, the Assistant Commissioner's order of deportation and denial of discretionary relief, issued in July of 1952, again prior to the statement of the Attorney General in the following October, is immune to the theory upon which petitioner attacks the refusal to suspend his deportation.

What the case comes down to, then, is simply this (see Pet. Br. 19–20): On October 2, 1952, the Attorney General announced a drive to deport alien racketeers, and petitioner was believed by the Department of Justice to fall within this category. Because of this, petitioner says, his case was "pre-judged by the Attorney General" (R. 4)—*i. e.*, adjudged by the Attorney General not to warrant discretionary relief prior to the decision of the Board of Immigration Appeals. In appraising this argument—even apart from the fact that the Attorney General's authorized representative has sufficiently denied the mental state petitioner attributes to the Attorney General—it is vital to remember that the Board of Immigration Appeals is an agency (1) created by and "in the Office of the Attorney General," (2) under the supervision and direction of the Attorney General and "responsible solely to him" (8 C. F. R., 1949 ed., 90.2), and (3) subject to review by the Attorney General (*id.*, 90.12). No less important is the fact that the discretion petitioner invoked was not that of the Board, but that of the Attorney General, upon whose advisory judgment Congress saw fit to rely.

Finally, it should be observed here at this early point in our argument that the claim of petitioner would, if accepted, mean that the Attorney General's possession of a discretionary pardoning power somehow precludes his personal participa-

tion in the enforcement duties with which Congress has charged him under the immigration laws. For, as petitioner's description of his "information and belief" makes clear (Br. 19–22), the charge of prejudgment means only that the Attorney General had determined to proceed against petitioner as an undesirable alien who was here (admittedly) illegally. We believe, in short, that petitioner's case rests in the last analysis upon the fact that the Attorney General in this instance is personally identified with obedience to the statutory command that aliens in petitioner's class "shall, upon the warrant of the Attorney General, be taken into custody and deported * * *." 8 U. S. C. (1946 ed.) 155 (a). It is our position that the Attorney General's performance of his duties in this respect affords no basis for disturbing the Attorney General's denial of discretionary relief—especially where, as here, the record on its face amply sustains the judgment that petitioner's career in the United States did not justify the executive clemency he sought.

I

SUSPENSION OF DEPORTATION IS A MATTER OF GRACE

Prior to 1940, the immigration laws contained no provision for relief in the case of a deportable alien. Unless Congress passed a private bill on his behalf, a deportable alien, however deserving in the particular case, was required under the

statutes to be expelled.[3] See Van Vleck, *The Administrative Control of Aliens,* p. 134.

Because cases arose in which the individual alien was "technically subject to expulsion, but * * * except for the technicality a desirable resident," it became apparent that there was a "need for executive clemency." *Ibid.* Legislation to supply this need was proposed by the Immigration and Naturalization Service in the Seventy-third and Seventy-fourth Congresses, but was not enacted until 1940, when the Seventy-sixth Congress in the Alien Registration Act (54 Stat. 670, 672) provided for suspension of deportation. As amended in 1948 in respects which are immaterial here, this statute provided in pertinent part, 8 U. S. C., Supp. V, 155 (c):

> In the case of any alien * * * who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may * * * suspend deportation * * * if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or

[3] Mitigating somewhat the hardships entailed by this situation, administrative regulations established in 1935 a system of "preexamination" under which aliens eligible for an immigration visa could have their status adjusted by leaving the country for Canada or other contiguous territory, obtaining a visa, and then reentering. For a description of the operation of this procedure, see S. Rep. No. 1515, 81st Cong., 2d Sess., pp. 603–606.

> minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon July 1, 1948.

The statute went on to provide that if the deportation of an alien was suspended for more than six months, the pertinent facts and law were to be reported in detail to Congress. Deportation could be canceled only if Congress passed a concurrent resolution stating in substance that it favored the suspension of deportation.[4]

It is clear from the statutory language alone that suspension of deportation is a matter of grace and not of right. Congress provided that, where the stated requirements were met by the alien, "the Attorney General may"—not "shall"—suspend deportation. See *United States ex rel. Adel* v. *Shaughnessy*, 183 F. 2d 371, 372–373 (C. A. 2). As the Senate Judiciary Committee observed in its study of the immigration laws preparatory to their recent revision (S. Rep. No. 1515, 81st Cong., 2d Sess., p. 600):

> Suspension of deportation is a discretionary action. Technical compliance by the alien with the formal eligibility requirements does not necessitate a conclusion that he will be granted suspension of deportation.

[4] The 1940 Act had provided for cancellation of deportation only if Congress took no adverse action within a stated period. 54 Stat. 672, 8 U. S. C., 1946 ed., 155 (c).

It was intended, in a word, that the Attorney General, subject to ratification by Congress only when he took action favorable to the alien, would decide on the particular facts of each case whether the alien was the kind of person who should be granted the relief allowed by the statute.

This conclusion is confirmed by the legislative history of the statute. As the bill which became the Alien Registration Act passed the House and was considered by the Senate, it provided for hearings on suspension by the Board of Review in the Department of Labor (then charged with enforcement of the immigration laws). See Hearing before a Subcommittee of the Committee on the Judiciary, United States Senate, 76th Cong., 3d Sess., on H. R. 5138, pp. 3–4. The bill provided that the Board in such cases should "act independently as a quasi judicial body" and that its decisions and recommendations should "not be subject to the control of any other officer of the Government." As in the version ultimately enacted, Congress retained control over this dispensing power, requiring reports of suspensions for more than six months containing "appropriate recommendations and the reasons for clemency * * *."

Mr. Shaughnessy, Deputy Commissioner of Immigration, while not opposed to the proposal to allow "clemency"—which had, after all, been sponsored by his agency (*supra*, p. 19)—voiced

objection to the bill's provision for "quasi judicial" action by the Board of Review. Explaining that this Board existed merely as an informal body of advisers to the Secretary of Labor, he said (Hearings, *supra,* p. 28):

> Therefore, there is no statutory board to which the amendment could refer and it has an effect of attempting to restrict the head of the department by limiting his authority to act upon the recommendation or decision of a subordinate administrative agency within his department. Moreover, the amendment includes the idea of a departure from a long-established principle that immigration administration should be a purely executive function, since this bill attempts to some extent to make that function a quasi judicial one.

As the bill was reported by the Senate Committee and passed by the Senate, the provision for quasi-judicial action was eliminated and decision as to suspension was merely left to the Attorney General (to whom immigration functions had in the meantime been transferred.)[5] S. Rep. No. 1796, 76th Cong., 3d Sess., p. 2. The Senate version was adopted. See H. Rep. No. 2683, 76th Cong., 3d Sess., pp. 9–10.

That the language of the statute was interpreted by the Attorney General as giving him discretion to determine each application for relief

[5] Reorganization Plan No. V, effective June 14, 1940, 5 Fed. Reg. 2223, 54 Stat. 1238.

on its individual merits was made crystal clear in the hearings on the 1948 amendments. Hearings before the Subcommittee on Immigration and Naturalization of the Committee on the Judiciary, House of Representatives, 80th Cong., 1st Sess., on H. R. 245. Mr. Shaughnessy, testifying with respect to the proposed amendments to create new classes eligible for discretionary relief, said (*id.*, p. 35):

> None of the provisions of this bill is mandatory upon the Attorney General. He has the discretion in every single case.

And again at p. 40:

> In vesting any discretionary power in these administrative folks, we realize that we are passing a law for all time, or at least for a long time in the future, and that there will be various personalities occupy that high position of Attorney General; but that is a gamble you have to make. There is nothing unusual about that.

See also the testimony of Attorney General Clark (*id.*, p. 128 *et seq.*) referring repeatedly to his exercise of "discretion" in the type of case under consideration.[6]

Following the plain mandate of the statutory language and history, the courts have consistently

[6] Like every other authority which has considered the subject, the President's Commission on Immigration and Naturalization in its Report in 1953 described the Attorney General's power as a "discretionary power to suspend deportation * * *." *Whom We Shall Welcome*, p. 211.

recognized that suspension of deportation was intended to be a matter of executive grace, subject at most to very limited judicial review for failure to exercise discretion or for misconception of the applicable law. As stated by Judge Learned Hand in *United States ex rel. Kaloudis* v. *Shaughnessy,* 180 F. 2d 489, 491 (C. A. 2), the "power of the Attorney General to suspend deportation is a dispensing power, like a judge's power to suspend the execution of a sentence, or the President's to pardon a convict. It is a matter of grace, over which courts have no review, unless—as we are assuming—it affirmatively appears that the denial has been actuated by considerations that Congress could not have intended to make relevant." Similarly, in *United States ex rel. Adel* v. *Shaughnessy,* 183 F. 2d 371, 372 (C. A. 2), it was held: "The courts cannot review the exercise of such discretion; they can interfere only when there has been a clear abuse of discretion or a clear failure to exercise discretion." And in *Sleddens* v. *Shaughnessy,* 177 F. 2d 363, 364 (C. A. 2), the court held that the "relator's claim in the habeas corpus proceedings that he was entitled to suspension of deportation was properly held to be without merit because such suspension was a matter of discretion on the part of the Attorney General which the court was without power to review." See also *United States ex rel. Weddeke* v. *Watkins,* 166 F. 2d 369 (C. A. 2), certiorari denied, 333 U. S. 876;

United States ex rel. Walther v. *District Director of Immigration and Naturalization,* 175 F. 2d 693, 694 (C. A. 2); *United States ex rel. Zeller* v. *Watkins,* 167 F. 2d 279, 282 (C. A. 2); *United States ex rel. Bartsch* v. *Watkins,* 175 F. 2d 245, 247 (C. A. 2); *Arakas* v. *Zimmerman,* 200 F. 2d 322 (C. A. 3).

II

THE ALLEGED USE OF CONFIDENTIAL INFORMATION PRESENTS NO ISSUE REQUIRING A HEARING

In his Exceptions, Argument and Brief following the order of the hearing officer, petitioner said (I. R. 163):

> That it is acknowledged that relief from deportation is not a right of any applicant but is a matter of discretion within the province of the Attorney General and to be exercised by him, and that he may consider evidence and information which may not be of record in order to properly arrive at a decision upon an action for discretionary relief.

For reasons developed below, we think petitioner was clearly correct in this view, and that he was in error when, in his second application for habeas corpus, he advanced the opposite thesis he now espouses. We submit, moreover, that the new position comes too late. At a time when there was no reason to suppose that confidential information would lead to denial of his request for discretionary relief, petitioner in effect sanc-

tioned and invited the use of such information as a basis for decision. Cf. *Bridges* v. *Wixon*, 326 U. S. 135, 151–153. He ought not to be heard to complain now that this course was followed.

But the complaint is in any event without merit. In the first place, as the courts below held, the record in this case, amply justifying the refusal to suspend deportation, made it unnecessary to place the Attorney General or his delegates on trial to determine whether (despite what appeared in the record and despite the sworn denial) confidential information had been considered in denying petitioner's application for discretionary relief. Secondly, there would be in any event no barrier to the Attorney General's reliance upon confidential information in exercising his discretion to determine whether clemency should be granted and whether he should make a recommendation of such action to Congress. For the statute imposes no such limitation. And petitioner, relying on regulations which were not applicable to this case, is mistaken in his contention that the Attorney General has, by his regulations, imposed upon himself a prohibition against using confidential information.

A. IN THE CIRCUMSTANCES OF THIS CASE, THE CONTROVERTED ALLEGATION THAT CONFIDENTIAL INFORMATION HAD BEEN RELIED UPON BY THE ATTORNEY GENERAL POSED NO ISSUE OF FACT REQUIRING A HEARING

As the court below observed (R. 21–22), the Attorney General's announcement in October

1952, of a drive against undesirable aliens was made months after the hearing officer and Assistant Commissioner ruled against petitioner's application for discretionary relief, "and could not have influenced them." While the announcement preceded the affirmance by the Board of Immigration Appeals, the "Board's opinion discusses only the evidence in the record, and such evidence was amply sufficient to support discretionary denial of suspension of deportation." (R. 22.) Contrary to petitioner's suggestion (Br. 22) "that he is one of the innocents caught in the current deportation drive" (though he denies neither the illegal entry which makes him deportable, the crime of fraud against the United States, nor his dubious financial affairs, including claiming as a dependent for tax purposes a father with substantial means), all three of the administrative decisions announce powerful justification for withholding the executive clemency petitioner seeks. On this record at least, assuming that the kind of inquiry petitioner proposes could ever be justified, there was no occasion to probe further into the mental processes of the officials who had decided against petitioner's application for relief from deportation.

1. There is, of course, no doubt that the courts below were correct in considering the whole record before them to determine whether a hearing was required. The procedure of ascertaining the facts of record before determining whether a petition

for habeas corpus should issue was sanctioned in *Walker* v. *Johnston,* 312 U. S. 275, 284, where this Court said:

> It will be observed that if, upon the face of the petition, it appears that the party is not entitled to the writ, the court may refuse to issue it. Since the allegations of such petitions are often inconclusive, the practice has grown up of issuing an order to show cause, which the respondent may answer. By this procedure the facts on which the opposing parties rely may be exhibited, and the court may find that no issue of fact is involved. In this way useless grant of the writ with consequent production of the prisoner and of witnesses may be avoided where from undisputed facts or from incontrovertible facts, such as those recited in a court record, it appears, as matter of law, no cause for granting the writ exists. On the other hand, on the facts admitted, it may appear that, as matter of law, the prisoner is entitled to the writ and to a discharge. This practice has long been followed by this court and by the lower courts. It is a convenient one, deprives the petitioner of no substantial right, if the petition and traverse are treated, as we think they should be, as together constituting the application for the writ, and the return to the rule as setting up the facts thought to warrant its denial, and if issues of fact emerging from the pleadings are tried as required by the statute.

The procedure established by *Walker* v. *Johnston* is today codified in 28 U. S. C. 2243, which authorizes issuance of an order "to show cause why the writ should not be granted" and provides that the person detained need not be produced at the hearing if "the application for the writ *and the return* present only issues of law." [Emphasis added.] See also *Burns* v. *Wilson*, 346 U. S. 137. In this case the affidavit of the Assistant United States Attorney (R. 5–8), with the record attached, served the function of a return "certifying the true cause of the detention" under 28 U. S. C. 2243.

The record showed that, long before issuance of the statement upon which the petition is based, a hearing officer had concluded that petitioner was not a worthy subject for suspension of deportation. It showed a similar determination by the Assistant Commissioner, again based on the facts of record and again prior to the Attorney General's October 1952 press release. It showed, finally, that the concurring decision of the Board of Immigration Appeals, which is ultimately the supposed basis for petitioner's attack, made no reference to facts outside the record.

The Board concluded in its opinion (I. R. 12, Pet. Br. 34): "After consideration of all the facts and circumstances in the case, we believe that the applications for relief should be denied as a matter of administrative discretion." The "facts and circumstances in the case," all in the record, in-

cluded (1) the conviction of petitioner in 1941 for conspiring, beginning two years after his illegal entry, to defraud the United States; (2) the discrepancy between petitioner's claiming his father as a dependent for income tax purposes and the father's conveying assets worth $50,000 as gifts to his daughter-in-law; and (3) the general obscurity as to the source of petitioner's assets, and the difficulties in reconciling his testimony as to his earnings with the evidence of substantial property.[7] These facts spoke persuasively against favorable exercise of the dispensing power Congress had entrusted to the Attorney General's discretion. At the least, they constituted wholly sufficient reason for denial of the discretionary relief petitioner sought. See *United States ex rel. Adel* v. *Shaughnessy,* 183 F. 2d 371, 372 (C. A. 2).

2. In the face of the record, what did petitioner allege? That the Attorney General had prepared a list of "unsavory characters" against whom deportation proceedings were to be brought; that petitioner was on this list; and that matters outside the record had been considered in denying the relief the Attorney General has discretion to

[7] The hearing officer, in his 1951 decision recommending against suspension of deportation, observed, after considering petitioner's financial situation: "A careful consideration of the evidence adduced during the hearing is not sufficiently convincing to satisfactorily indicate source of income of the [petitioner], nor the total amount of such income" (I. R. 160).

grant (R. 3–4). The "information and belief" petitioner alleged is elaborated in his brief (pp. 19–22), which makes clear that petitioner's case rests entirely upon the fact that officials of the Department of Justice have (1) performed their duty to bring deportation proceedings against aliens residing here illegally, (2) expedited cases of aliens deemed to be particularly undesirable, (3) believed petitioner to belong to this class, and (4) made public statements describing these activities following the decision of the Board of Immigration Appeals in this case on April 3, 1953. These allegations afforded no warrant for the additional, judicial hearing petitioner sought on his claim for clemency. It was sufficient on this record that the facts sustained denial of the claim by the executive authority Congress trusted to pass upon it; that there was no need to go beyond these facts to reach this conclusion; and that the Attorney General's authorized representative had entered a sworn denial that matters outside the record had been considered. Any other view would, as the court below concluded (R. 23), provide a ready means for "every deportable alien * * * to delay his justifiable deportation" by demanding a judicial inquiry into the process of judgment resulting in the denial of discretionary relief.

For the fact is present in every case that the Attorney General is "the executive head of the Immigration and Naturalization Service" (*Carl-*

son v. *Landon,* 342 U. S. 524, 526), and that "the power to deport has been entrusted [to him] * * * or such agency as he designates" (*Bridges* v. *Wixon,* 326 U. S. 135, 153). It is, by statute, "upon the warrant of the Attorney General" that a deportable alien is "taken into cutsody and deported." 8 U. S. C. 155 (a). In administering this and his many other responsibilities, the Attorney General or his delegate must, as everyone knows, make investigations, gather information (often confidential), and make judgments as to the relative gravity and priority of various tasks.

There is nothing extraordinary, therefore, in the fact that efforts should be made by the Department of Justice to expedite proceedings against deportable aliens whose presence here is deemed particularly undesirable. Nor is it surprising that public statements (of which all those mentioning petitioner came after the decision of the Board of Immigration Appeals on April 3, 1953) should be made describing these efforts. Yet petitioner contends that such facts entitle him to a trial of his "information and belief" that the administrative judgments which led to deportation proceedings against him precluded the exercise of discretion in considering his application for discretionary relief.

It is clear, we think, that it is this premise upon which petitioner's case stands or falls. He has described his "information and belief" at some

length (Pet. Br. 19–22). He justifies this form of his pleading by pointing out (Br. 26) that the facts he alleges are peculiarly within the knowledge of the Attorney General. He asserted baldly in his petition for habeas corpus that consideration had been given to "matters outside the record of his immigration hearing" (R. 4), but gave no intimation of the nature or form of these matters beyond the subsequent public statements to which he refers here. Petitioner asks, in short, that the administrative decision, adequate and regular on its face, be tested by eliciting facts peculiarly within the knowledge of the Attorney General to establish that the exercise of administrative discretion was as proper as it appears to be.

To embark upon such an inquiry upon the allegations petitioner presents is to deny that the Attorney General can properly be trusted both to prosecute deportation proceedings and to grant executive relief from deportation. But judgment on this question, whatever its merits, was for Congress.

We have accepted for this portion of our argument the assumption (later, subpoint B, *infra,* urged to be incorrect) that matters outside the record of the deportation hearings could not be considered in determining whether to grant suspension of deportation. We submit, however, that petitioner's conjectures, which were denied, that the prosecuting activities of the Department of Justice pervaded and destroyed the exercise of the

Attorney General's power to grant discretionary relief do not merit the trial petitioner seeks of the deciding process. This Court has had occasion before to disapprove attempts to probe the minds of administrators. *United States* v. *Morgan*, 313 U. S. 409, 421–422; Davis, *Administrative Law*, p. 336. No such probe was warranted here.

3. We do not contend, nor do we understand the court below to have held, that allegations in a petition for habeas corpus are insufficient to raise an issue of fact requiring a hearing merely because they are made on information and belief. Reading the opinion as a whole, we think the majority holds that in this case—where the evidence of record so amply supports the conclusion reached, where decisions adverse to petitioner had been made by both the hearing officer and the Assistant Commissioner before compilation of the alleged list on which petitioner relies—it takes more than such general allegations as petitioner has made on information and belief to raise an issue requiring a hearing. It is not new law that facts are required to support a petition for habeas corpus. *Cuddy, Petitioner*, 131 U. S. 280, 286; *Kohl* v. *Lehlback*, 160 U. S. 293, 299; *United States* v. *Ju Toy*, 198 U. S. 253, 261; *Collins* v. *McDonald*, 258 U. S. 416, 420; *Hodge* v. *Huff*, 140 F. 2d 686, 688 (C. A. D. C.), certiorari denied, 322 U. S. 733; *Long* v. *Benson*, 140 F. 2d 195, 196 (C. A. 6), certiorari denied, 322 U. S. 732. And it was apparent from petitioner's argument below,

as here, that his allegation of reliance by the Board of Immigration Appeals upon matters outside the record was built on speculation. From the fact that a group of deportation proceedings was deemed important to prosecute because the deportable aliens involved were believed undesirable, it did not follow at all that the Board of Immigration Appeals abandoned the judgment the Attorney General had instructed it to exercise on his behalf in determining whether his discretionary grant of relief would be warranted.

This is most readily illustrated by the careful, and sometimes favorable, action which has been taken by the Attorney General's subordinates in cases which, like petitioner's, were expedited under the Attorney General's program to insure enforcement of the deportation laws against aliens believed to be especially undesirable. In two of these cases, special inquiry officers (hearing officers) have ruled that the persons involved were not subject to deportation.[8] In two others, the Board of Immigration Appeals has affirmed orders granting the privilege of voluntary departure which, like suspension of deportation, is within the Attorney General's discretion.[9] In

[8] *Matter of M——*, Imm. File No. E–076973 (January 7, 1954); *Matter of R——*, Imm. File No. A–4656075 (January 14, 1954). The decisions in both cases will be reviewed by the Board of Immigration Appeals.

[9] *Matter of M——*, Imm. File No. A–2182808 (January 25, 1954); *Matter of F——*, Imm. File No. A–7388927 (August 19, 1953).

other cases, following orders for deportation, the Board has ordered the proceedings reopened to consider further applications for suspension of deportation or to permit the filing of such applications.[10] These instances merely illustrate that decisions in the Department of Justice to commence deportation proceedings are neither decisions in advance on deportability nor judgments in advance on the propriety of discretionary relief. It was clear in the courts below, as it is here, that petitioner's allegations amounted only to the contrary conjecture that his case had been prejudged because it was deemed to warrant expedition.[10a]

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[10] *Matter of B——*, Imm. File No. E–082511 (October 10, 1953); *Matter of B——*, Imm. File No. A–2544646 (December 28, 1953); *Matter of C——*, Imm. File No. E–051721 (January 21, 1954); *Matter of M——*, Imm. File No. A–3486560 (October 9, 1953).

[10a] One of the very press releases upon which petitioner relies—a release, incidentally, which followed by months the conclusion of petitioner's case—illustrates the tenuous character of petitioner's theory that because it is responsible for prosecuting cases like this (and because some may be deemed to warrant priority) the Department of Justice must *ipso facto* account in court for a denial of discretionary relief. The brief statement of Deputy Attorney General Rogers on September 29, 1953, to the District Directors of the Immigration and Naturalization Service (referred to at Pet. Br. 21), reviewing the efforts to deport undesirable aliens who are in this country illegally, concluded with these observations:

> We are all aware of the tremendous amount of manpower and time required to process denaturalization and deportation cases to a conclusion. Aside from investigation, review, and administrative adjudications and appeals, there are judicial reviews, stays, and appeals

Nor was petitioner's inference rendered any less speculative by the fact that, after the decision of the Board of Immigration Appeals on April 3, 1953, statements emanating from the Department of Justice described him as a racketeer and an undesirable alien. It remains clear that all petitioner was alleging was that the Board *must have* acted on the basis of such outside matters and not, as it purported to act, on the basis of the facts of record [11]—and this after a new At-

which must be met and served before final action may be taken in any case. We are not begrudging these time and manpower consuming steps—on the contrary we would be the first to defend the naturalized citizens' and aliens' right to them—but we should make certain that we handle them with as much dispatch and vigor as is consistent with good government and the rights of the parties involved. There should be no delay occasioned or tolerated through negligence, indifference, or purely dilatory tactics. The alien or naturalized citizen, as well as the public as represented through its Government, is entitled to a speedy but thorough adjudication of these cases. Moreover, whenever the opportunity arises, care should be taken to explain to members of the public these various steps which must be taken in the denaturalization and deportation processes so that they may understand why such action cannot and should not be accomplished in a summary manner, a manner in which we know that the American people would not countenance even if it were legally possible.

[11] It should be noted that when the Board of Immigration Appeals has considered confidential information it has said so. See, *e. g.*, *United States ex rel. Matranga* v. *Mackey*, 115 F. Supp. 45 (S. D. N. Y.); *Alexiou* v. *McGrath*, 101 F. Supp. 421 (D. D. C.). If such information had been considered by the Board in this case, it may fairly be assumed that the Board would have referred to this fact, just as it referred to the other specific facts which sustain its decision.

torney General had taken office. It is equally clear that the refutation of this controverted supposition called ultimately for testimony in court by the Board and the Attorney General to show that their actions were what they appeared to be. In this context, particularly in light of the fact that the determination in issue was the denial of clemency which is within the Attorney General's discretion, we think it clear that the courts below correctly denied the further hearing petitioner sought.

B. NEITHER THE STATUTE NOR THE REGULATIONS OF THE ATTORNEY GENERAL PRECLUDE REFERENCE TO CONFIDENTIAL INFORMATION IN EXERCISING THE DISCRETIONARY POWER TO SUSPEND DEPORTATION

1. As we have shown in Point I (pp. 18–25, *supra*), suspension of deportation is not a matter of right, but of grace, in the nature of an executive pardon. The statute leaves the dispensation of this privilege entirely to executive discretion, subject to control only by the legislature—a control designed only to deny the privilege to some aliens deemed worthy by the Attorney General, not to revise his judgment where it is against suspension. The statute does not even require that there be a hearing on an application for suspension of deportation. It leaves to the unfettered determination of the Attorney General the procedure he is to employ in exercising his power.

It is clear, therefore, at least so far as the statute is concerned, that the Attorney General

is free, as the President is free in exercising the pardoning power, to consider any information he deems relevant, from whatever source, in deciding whether an alien who meets the minimum requirements fixed by Congress is entitled to administrative grace. *Cf. Knauff* v. *Shaughnessy,* 338 U. S. 537, 542, 544.[12] Even where statutes in terms require a "hearing" as part of the administrative process, the statutory purpose and context may justify withholding confidential information from the party entitled to be heard. *United States* v. *Nugent,* 346 U. S. 1; *Norwegian Nitrogen Products Co.* v. *United States,* 288 U. S. 294. Here, where there is no such requirement, the justification is obvious. Congress chose to rely upon the informed judgment of a Cabinet officer whose facilities for investigation are well known. It trusted him with a power of dispensation akin to powers of executive and judicial clemency which are commonly exercised by reference to matters outside a record of hearing.[13] There is, in a word, no basis for petitioner's effort (Br. 17–

[12] There is, of course, no doubt—and petitioner suggests none—that Congress could constitutionally authorize the Attorney General to proceed on confidential information in cases like this. Compare *Williams* v. *New York*, 337 U. S. 241, 247, holding that a sentencing judge, ordering execution rather than the life sentence recommended by a jury, could rely in reaching this judgment upon information not disclosed to the convicted defendant.

[13] Overlooking the character of the discretionary relief sought, petitioner is wide of the mark when he invokes (Br. 26–27) procedural analogies from fields of regulatory administrative action subject to full judicial review.

18) to find in the silence of Congress a prohibition against use of confidential information in deciding whether to suspend deportation. Cf. *United States ex rel. Dolenz* v. *Shaughnessy*, 206 F. 2d 392 (C. A. 2).

2. For his objection to the use of confidential information, petitioner rests primarily (Br. 12–17), as did Judge Frank, dissenting, in the court below (R. 24), upon the regulations issued by the Attorney General. Relying upon the fact that, although Congress did not require it, the Attorney General has granted a hearing to a deportable alien seeking suspension of deportation, petitioner finds in the regulations governing this hearing a prohibition against reliance upon confidential information by the Attorney General—or by the agency he has created within his Office to act for him, subject to his supervision and review, the Board of Immigration Appeals. We submit that the regulations applicable to this case contain no such self-imposed restriction.

It should be noted, first, in this connection, that petitioner relies on regulations which were inapplicable to his case, referring repeatedly (Br. 6–7, 15, 26) to 8 C. F. R. (1949 ed.) 150.7 (b), which was superseded before the hearing involved here. This regulation and the others then in existence were interpreted in *Alexiou* v. *McGrath*, 101 F. Supp. 421 (D. D. C.) as creating "a quasi-judicial procedure" whereby the Attorney General denied himself the use of information

undisclosed to the alien. As we indicate below (notes 15 and 17, *infra*), and as petitioner's misplaced reliance upon them suggests, the regulations applicable in the district court decision in *Alexiou* may have afforded a somewhat more substantial basis for petitioner's contention than do the regulations applicable here. But we do not stop to reargue *Alexiou* in the light of the regulations it considered, except to note our belief that the decision was erroneous. For the regulations were changed in 1950 and January, 1951, before petitioner's new hearing was begun in August, 1951. Concentrating on the later regulations applicable to petitioner's case, we submit that they cannot justify the claim that the Attorney General has divested himself of the power Congress left him to refer to confidential matters in exercising his discretion. Compare *United States ex rel. Matranga* v. *Mackey,* 115 F. Supp. 45 (S. D. N. Y.),[14] discussing the *Alexiou* case and the changes in the regulations, and concluding that the changed regulations did not bar reliance by the Board of Immigration Appeals upon confidential information.

Among the changed regulations in force at the time of petitioner's hearing in 1951 were those issued on January 4, 1951, allowing an alien against whom deportation proceedings had

[14] Pending on appeal in the Court of Appeals for the Second Circuit.

been commenced to apply before hearing for suspension of deportation. 8 C. F. R. (1951 Supp.) 150.7–150.13. These regulations stated (Section 150.9):

> * * * The burden of proof shall be upon the applicant. In presenting his proof he shall be entitled to the benefit of *any disclosable records* concerning him which are in the custody of the Service. [Emphasis added.]

It was further provided (Section 150.10):

> * * * If the sworn application form, supporting documentary evidence, *records of the Service,* and the testimony of the applicant * * * establish the applicant's eligibility for suspension of deportation, no other witnesses shall be required. [Emphasis added.]

Thus, the regulations indicated at their outset that records of the Service might be considered in judging an application for suspension. Granting the alien access to records which were *disclosable,* they show that as to others which might be undisclosable there would be no such access.[15] There is nothing in the rest of the regulations to sustain the view that records which were undisclosable but relevant on the pre-hearing application were somehow required to be disclosed or excluded from consideration when the Attorney

[15] The regulations prior to those applicable here did not contain references to use of records of the Service and use by the alien of disclosable records like those we have quoted.

General or the Board made the ultimate determination as to whether discretionary relief should be granted.

The regulations did provide that if his prehearing application for suspension was denied, the alien could make another application "during the course of the hearing under the warrant of arrest." 8 C. F. R. (1951 Supp.) 150.12. The regulations governing the hearings stated, as petitioner points out (Br. 15), that the hearing officer should "present all *available* evidence * * * concerning * * * factors bearing upon *statutory eligibility* for discretionary relief * * *." *Id.*, 151.2 (c) (emphasis added).[16] It was also provided that the hearing officer's decision should "contain a separate determination as to whether or not the hearing officer is satisfied, on the basis of the evidence presented, as to the alien's *statu-*

[16] It may be noted that "statutory eligibility" is a necessary, but not a sufficient, condition for the granting of discretionary relief by the Attorney General. And the regulations under consideration highlighted this point. Thus, Section 150.13, pertaining to the application for suspension before the deportation hearing, provided:

> If, on the basis of the evidence presented, the Commissioner is satisfied that the alien has established eligibility for suspension of deportation, and if the Commissioner is satisfied that suspension of deportation should be authorized, he shall enter an order directing that the alien's deportation be suspended.

The Commissioner was required to be satisfied by the "evidence" as to "eligibility," but there was no suggestion that he was forbidden to go beyond the record in determining whether suspension "should be authorized."

tory eligibility for the relief requested." *Id.*, 151.5 (a) (emphasis added). But the same regulation declared that the hearing officer should have "no authority to exercise the Attorney General's powers" to grant discretionary relief.[17] This determination was to be made in the first instance by the Commissioner under Section 151.5 (e), subject to a right of appeal to the Board of Immigration Appeals. The Commissioner was empowered under 151.5 (e) to "enter any order which he deems appropriate for the disposition of the case."

The most obviously pertinent facts about the foregoing regulations are (1) that they show expressly, at least with reference to an application

[17] Compare the superseded regulations to which petitioner refers. Under these the presiding inspector (hearing officer) was required, where the alien applied for suspension of deportation, to "follow his conclusions of law as to the alien's deportability with a discussion of the evidence relating to the alien's eligibility for such relief and of his reasons for his proposed order." 8 C. F. R. (1949 ed.) 150.7 (b). Then, in his proposed order, the inspector was authorized to recommend "suspension of deportation in accordance with the judgment he has made on the basis of the evidence adduced at the hearing." *Id.*, 150.7 (c).

We do not concede that this provision for a proposed order based on "the evidence adduced at the hearing," should have been read, as it was by the district court in *Alexiou* v. *McGrath*, *supra*, as constituting a prohibition by the Attorney General against reference to confidential information by himself or by the Board he had created to act for him subject to his supervision and review. But we point out here that the subsequent regulations afford even less basis for implying any such prohibition.

for suspension prior to the deportation hearing, that undisclosable matters may be pertinent in passing upon such an application, and (2) that they contain no express prohibition against consideration of such matters at any time by the Attorney General or the Board of Immigration Appeals. The prohibiton, if the Attorney General intended to issue it against himself, must be found by implication. And the implication must be that, because he afforded the alien a hearing Congress does not appear to have required, the hearing must entail all the restrictions drawn from contexts where judgment is less free and judicial review broader.

We think there is no warrant for reading into the Attorney General's regulations any such restrictions on his discretionary power to grant what amounts to executive clemency. It made perfect sense, of course, to hear the alien's evidence bearing on his application for relief along with evidence as to deportability. It was appropriate and necessary that all available evidence relating to possible suspension should be received and considered, and it was reasonable to require the hearing officer to summarize the evidence for the Attorney General or his delegates with power of decision. But it does not follow that because his regulations served these purposes, the Attorney General forbade himself the use of material he deemed undisclosable. Cf. *Ludecke* v. *Wat-*

kins, 335 U. S. 160, 171–172.[18] Congress relied upon the judgment of the Attorney General. Cases may arise where that judgment is against clemency and where matters underlying the judgment are deemed undisclosable. Neither the statute nor the regulations can justify a requirement that the Attorney General either recommend suspension to Congress, contrary to his views, or disclose to the alien matters which he believes should be kept confidential in the public interest.

Such cases are unlikely to be common. For reasons we have outlined, we think it clear that no such case is here now. Be this as it may, the regulations petitioner invokes afford no basis for further delay of "his justifiable deportation" (R. 23). In proceedings which complied fully with the regulations, his application for suspension of deportation was properly denied.[19]

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[18] "The fact that hearings are utilized by the Executive to secure an informed basis for the exercise of summary power does not argue the right of courts to retry such hearings, nor bespeak denial of due process to withhold such power from the courts."

[19] The regulations now in effect under the Immigration and Nationality Act of 1952 expressly sanction the administrative practice the Attorney General deemed proper under his prior regulations. It is now provided that "the determination as to whether the application for * * * suspension of deportation shall be granted or denied (whether such determination is made initially or on appeal) may be predicated upon confidential information without the disclosure thereof to the applicant, if in the opinion of the officer or the Board making the determination the disclosure of such information would be prejudicial to the public interest, safety, or security." 8 C. F. R. (1952 ed.) 244.3.

III

PETITIONER'S ALLEGATION THAT HIS CASE WAS PREJUDGED DID NOT POSE AN ISSUE OF FACT REQUIRING A HEARING

The petition for habeas corpus alleged (R. 4, par. 19) that "the decision to deny favorable discretionary relief herein was prejudged by the Attorney General on October 2, 1952," when petitioner's name was included in the alleged list of aliens against whom deportation proceedings were to be expedited. The court below concluded (R. 22) that this allegation, which was denied (R. 6, 7), added nothing to petitioner's case. For reasons substantially similar to those already discussed in connection with the allegation that confidential information was considered, we think the courts below were clearly correct in denying petitioner's right to search the Attorney General's mind for the "prejudgment" he suspected.

Here again it is highly relevant that the hearing officer had recommended, and the Assistant Commissioner had decided on the record, that suspension of deportation should be denied before the alleged prejudgment in October 1952. There remained only an appeal to the Board of Immigration Appeals, an agency created by the Attorney General in his Office to act for him in such cases subject to his supervision and review. 8 C. F. R. (1949 ed.) 90.2, 90.12.

Even assuming for the purposes of argument that the Attorney General in effect dictated the

decision of the Board of Immigration Appeals, petitioner was deprived of no rights. Given the Attorney General's power to review and reverse his Board, petitioner's only practical complaint would be that the Attorney General's ruling appears to be the Board's rather than his own. Such an allegation would not, even if true, show the deprivation of any substantial right or warrant invalidation of the Attorney General's exercise of his discretion.

But petitioner's information and belief does not descend to a concrete allegation that the Attorney General dictated the Board's decision. And it would be a startling thing indeed—scarcely to be inferred from the broadside charge of "prejudgment"—to suggest that the Attorney General found it necessary to dictate the Board's decision to spare himself the possible task of reversing a determination with which he disagreed. The complaint merely is, however, that the Attorney General "pre-judged * * * when he included [petitioner's] name in the list" (R. 4)—*i. e.*, that the very act of selecting this case for prosecution vitiated the later decision on petitioner's application for discretionary relief.

The short answer again is that both functions—the prosecution of deportation cases and decision on applications for discretionary relief—have been entrusted to the Attorney General. The fact that he performed the first is no ground for launching an inquiry into his performance of the second.

IV

THE ALLEGATION THAT DISCRETIONARY RELIEF HAD BEEN GRANTED IN ALL SIMILAR CASES PRESENTED NO ISSUE WARRANTING A HEARING

Petitioner's remaining contention (Br. 26–29) is that the district court should have received evidence on the allegation that aliens in "similar cases" had received discretionary relief. The argument, unmentioned in Judge Frank's dissent, is plainly insubstantial. It rests in part on the assertion (Pet. Br. 26) "that the hearing officer, the Assistant Commissioner, and the Board of Immigration Appeals merely concluded, without disclosing the basis therefor, that discretion should not be exercised favorably." This assertion, as we have shown (see pp. 4–8, 29–30, *supra*) is thoroughly refuted by the record, which reveals in the administrative decisions grounds more than ample for deeming petitioner unworthy of discretionary relief.

More fundamentally, petitioner's argument overlooks the central point that the discretionary judgment in each case turns on the particular facts of the case. This is most readily demonstrated by reference to a decision upon which petitioner relies—*Matter of L——*, 3 I. & N. Dec. 767—in his effort to suggest that mechanically applied rules govern the granting of suspension of deportation. In that case, while it listed (p. 770) "as appropriate elements in ar-

riving at a decision" the factors to which petitioner refers (reformation, family ties, etc.), the Board of Immigration Appeals said (*ibid.*):

> We realize, of course, the difficulty, if not impossibility, of defining any standard in discretionary matters of this character which may be applied in a stereotyped manner. Even if it could be done, we feel very definitely it would be wrong to do so. Each case must be considered on its own facts. This is basic.

On this obviously appropriate test the unverifiable character of petitioner's allegation becomes apparent. Judgment in this case, as in all such cases, rested upon a total impression of petitioner's character and career as a basis for possible relief from his conceded deportability. The factors constituting the impression included, not only petitioner's conviction for conspiracy to defraud the United States (in itself no small discouragement to extraordinary hospitality), but the strange discrepancy between petitioner's claim for tax purposes that he supported his father and the evidence of the father's substantial wealth, together with petitioner's persistent inability to account satisfactorily for his own considerable assets. Manifestly, no other case, much less all other cases of aliens once convicted of crime, could present the same factors in the same detail.

Petitioner's allegation called, then, for case-by-case analysis of the thousands of instances where discretionary relief had been granted or

denied. And the demonstration petitioner proposed was plainly impossible. For the unique character of each case would render futile the effort to mark out a rule by means of the catalogue of factors petitioner suggests.

The decisive difference between this case and *United States ex rel. Knauff* v. *McGrath*, 181 F. 2d 839 (C. A. 2), vacated as moot, 340 U. S. 940, upon which petitioner relies (Br. 28), is readily stated. There, the allegation was that the Attorney General had adopted a uniform practice of staying deportation while a bill for relief was pending in Congress. The specific, concrete character of the evidence which could prove or disprove this allegation is clear. No comparable situation existed here. The futile judicial hearing petitioner sought was properly denied.

CONCLUSION

The deportation proceedings against petitioner have been pending since 1947. Petitioner is concededly in the United States illegally with no defense to the charge upon which his deportation has been ordered. The discretionary determination denying petitioner's application for suspension of deportation is fully justified by the facts in the administrative record. The allegations on which petitioner would postpone his deportation for a judicial review of the manner in which the Attorney General's discretion was exercised are

neither factually substantial nor legally significant. It is respectfully submitted that the judgment below should be affirmed.

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JANUARY 1954.

APPENDIX

Section 19 (c) of the Immigration Act of 1917, as amended, 8 U. S. C. (Supp. V) 155 (c), provided in pertinent part:

> In the case of any alien (other than one to whom subsection (d) of this section is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States to any country of his choice at his own expense, in lieu of deportation; or (2) suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act. [July 1, 1948]. If the deportation of any alien is suspended under the provisions of this subsection for more than six months, a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons for such suspension. These reports shall be submitted on the 1st and 15th day of each calendar month

in which Congress is in session. If during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, the Congress passes a concurrent resolution stating in substance that it favors the suspension of such deportation, the Attorney General shall cancel deportation proceedings. If prior to the close of the session of the Congress next following the session at which a case is reported, the Congress does not pass such a concurrent resolution, the Attorney General shall thereupon deport such alien in the manner provided by law. * * * Upon the cancellation of such proceedings in any case in which fee has been paid the Commissioner shall record the alien's admission for permanent residence as of the date of his last entry into the United States and the Secretary of State shall, if the alien was a quota immigrant at the time of entry and was not charged to the appropriate quota, reduce by one the immigration quota of the country of the alien's nationality as defined in section 12 of the Act of May 26, 1924 (U. S. C., title 8, sec. 212), for the fiscal year then current at the time of cancellation or the next following year in which a quota is available: *Provided,* That no quota shall be reduced by more than 50 per centum in any fiscal year.

8 C. F. R. (1949 ed.) 150.7 provided:

§ 150.7 *Proposed findings, conclusions, and order.* * * *

(b) *Eligibility for departure in lieu of deportation or for suspension of deportation.* If the alien has applied for the privi-

lege of departure in lieu of deportation or for suspension of deportation as provided in 150.6 (g), § 150.8 (b), or § 150.10, the presiding inspector shall follow his conclusions of law as to the alien's deportability with a discussion of the evidence relating to the alien's eligibility for such relief and of his reasons for his proposed order. He shall then state in numbered paragraphs his proposed findings of fact and his proposed conclusions of law as to the alien's eligibility for the relief requested.

(c) *Proposed order.* In the proposed order the presiding inspector shall recommend cancellation of the proceedings, deportation, departure under order of deportation, departure in lieu of deportation, or suspension of deportation in accordance with the judgment he has made on the basis of the evidence adduced at the hearing.

8 C. F. R. (1951 Supp.) 150 provided in pertinent part:

§ 150.7 *Application, prior to hearing, for suspension of deportation*—(a) *Who may apply.* Any alien against whom warrant proceedings have been instituted who believes himself entitled to suspension of deportation may apply therefor prior to hearing by filing Form I–256, in duplicate, properly filled out and executed, together with two photographs as prescribed in § 364.1 of this chapter, at the office of the Service having jurisdiction over the applicant's place of residence.

* * * * *

§ 150.9 *Evidence; burden of proof.* All evidence adduced during this special procedure may be used in any other proceeding and the alien shall be duly informed

of this fact. The burden of proof shall be upon the applicant. In presenting his proof he shall be entitled to the benefit of any disclosable records concerning him which are in the custody of the Service.

§ 150.10 *Examination.* * * * If the sworn application form, supporting documentary evidence, records of the Service, and the testimony of the applicant or the parent or guardian, if applicant is a child under the age of 18 years, establish the applicant's eligibility for suspension of deportation, no other witnesses shall be required. Otherwise, such number of credible witnesses, preferably citizens of the United States, as may be deemed necessary, shall be questioned under oath by the examiner concerning the facts of the applicant's eligibility for the relief requested, or, where such witnesses cannot appear because of remoteness, disability, or any other cause which the officer in charge deems good and sufficient, their affidavits may be accepted without requiring their personal appearance. * * *

§ 150.11 *Disposition by examiner*—(a) *Eligibility for relief established.* If, on the basis of the evidence presented, the examiner concludes that the alien has established eligibility for suspension of deportation, he shall prepare a memorandum stating therein the grounds for the alien's deportability and basis of the alien's eligibility for suspension of deportation. The entire record shall then be delivered to the officer in charge of the district for transmittal to the Commissioner.

* * * * *

§ 150.13 *Decision by Commissioner.* * * *

(b) *Eligibility not established.* If, on the basis of the evidence presented, the Commissioner is satisfied that the alien

has not established his eligibility for suspension of deportation, or if the Commissioner is satisfied that suspension of deportation should not be authorized, he shall terminate the special procedure and further action shall thereupon be taken as provided in § 150.12.

8 C. F. R. (1951 Supp.) 151 provided in pertinent part:

§ 151.3 *Contents of record; evidence.* * * *

* * * * *

(e) *Application for discretionary relief.* At any time during the hearing under the warrant of arrest the alien may apply for suspension of deportation, or for the privilege of departing from the United States at his own expense in lieu of deportation, or for the privilege of departing from the United States at his own expense in lieu of deportation with the additional privilege of preexamination. He may apply in the alternative for more than one of these three forms of relief. The burden of establishing that the alien meets the statutory requirements precedent to the exercise of discretionary relief shall be upon the alien. In addition, he may submit any written or oral material which he believes should be considered in the exercise of discretion by the Commissioner.

* * * * *

§ 151.5 *Decision.*—(a) *Preparation by hearing officer of written decision.* Except as provided in paragraph (d) of this section, the hearing officer shall, as soon as practicable after the conclusion of the hearing, prepare in writing a decision signed by him, which shall set forth a summary of the evidence adduced and his findings of fact and conclu-

sions of law as to deportability. If the alien has applied for relief from deportation, the decision shall also contain a separate determination as to whether or not the hearing officer is satisfied, on the basis of the evidence presented, as to the alien's statutory eligibility for the relief requested. * * * The hearing officer shall have no authority to exercise the Attorney General's powers under section 19 (c) (2) of the Immigration Act of February 5, 1917, as amended, or under the seventh proviso to section 3 of that act, or to designate at whose expense or to which country the alien shall be deported.

* * * * *

(e) *Finality of decision.* The hearing officer's decision described in paragraphs (a) and (d) of this section shall be final except:

* * * * *

(2) When the hearing officer determines that the alien be found to have established statutory eligibility for suspension of deportation and the hearing officer provides for no other disposition of the case;

* * * * *

(4) * * * Every case within subparagraphs (1) to (4), inclusive, shall be referred promptly to the Commissioner and the hearing officer's decision shall be final only upon approval by the Commissioner, subject, however, to appeal to the Board of Immigration Appeals as provided in § 90.3 of this chapter. In considering such cases, the Commissioner may enter any order which he deems appropriate for the disposition of the case. * * *

* * * * *

§ 151.9 *Decision by the Commissioner*—(a) *Form and finality.* The decision of the Commissioner shall be in writing and shall, unless the alien or his counsel or representative appeals to the Board of Immigration Appeals within the time specified in § 90.9 (b) of this chapter, be final.

28 U. S. C. (Supp. V) 2243 provides:

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

28 U. S. C (Supp. V) 2246 provides:

On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits.

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SUPREME COURT OF THE UNITED STATES

No. 366.—October Term, 1953.

United States of America, ex rel. Joseph Accardi, Petitioner, *v.* Edward J. Shaughnessy, District Director of the Immigration and Naturalization Service, New York District, Department of Justice.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[March 15, 1954.]

Mr. Justice Clark delivered the opinion of the Court.

This is a habeas corpus action in which the petitioner attacks the validity of the denial of his application for suspension of deportation under the provisions of § 19 (c) of the Immigration Act of 1917.[1] Admittedly deport-

[1] 54 Stat. 671, as amended, 8 U. S. C. § 155 (c) (1946 ed., Supp. V). Section 405 is the savings clause of the Immigration and Nationality Act of 1952 and its subsection (a) provides that:

"Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any . . . proceeding which shall be valid at the time this Act shall take effect; or to affect any . . . proceedings . . . brought . . . at the time this Act shall take effect; but as to all such . . . proceedings, . . . the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. . . . An application for suspension of deportation under section 19 of the Immigration Act of 1917, as amended, . . . which is pending on the date of enactment of this Act [June 27, 1952], shall be regarded as a proceeding within the meaning of this subsection." 66 Stat. 280, 8 U. S. C. p. 734 (1952).

Since Accardi's application for suspension of deportation was made in 1948, § 19 (c) of the 1917 Act continues to govern this proceeding rather than its more stringent equivalent in the 1952 Act, § 244, 66 Stat. 214, 8 U. S. C. § 1254 (1952).

able, the petitioner alleged, among other things, that the denial of his application by the Board of Immigration Appeals was prejudged through the issuance by the Attorney General in 1952, prior to the Board's decision, of a confidential list of "unsavory characters" including petitioner's name, which made it impossible for him "to secure fair consideration of his case." The District Judge refused the offer of proof, denying the writ on the allegations of the petitioner without written opinion. A divided panel of the Court of Appeals for the Second Circuit affirmed. 206 F. 2d 897. We granted certiorari. 346 U. S. 884.

The Justice Department's immigration file on petitioner reveals the following relevant facts. He was born in Italy of Italian parents in 1909 and entered the United States by train from Canada in 1932 without immigration inspection and without an immigration visa. This entry clearly falls under § 14 of the Immigration Act of 1924 [2] and is the uncontested ground for deportation. The deportation proceedings against him began in 1947. In 1948 he applied for suspension of deportation pursuant to § 19 (c) of the Immigration Act of 1917. This section as amended in 1948 provides, in pertinent part, that:

> "In the case of any alien (other than one to whom subsection (d) of this section is applicable) who is deportable under any law of the United States and who has proved good moral character for the pre-

[2] "Any alien who at any time after entering the United States is found to have been at the time of entry not entitled under this Act to enter the United States . . . shall be taken into custody and deported in the same manner as provided for in sections 19 and 20 of the Immigration Act of 1917. . . ." 43 Stat. 162, 8 U. S. C. § 214 (1946). This ground for deportation is perpetuated by § 241 (a) (1) and (2) of the Immigration and Nationality Act of 1952. 66 Stat. 204, 8 U. S. C. § 1251 (a) (1) and (2) (1952).

ceding five years, the Attorney General may . . . suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon July 1, 1948."

Hearings on the deportation charge and the application for suspension of deportation were held before officers of the Immigration and Naturalization Service at various times from 1948 to 1952. A hearing officer ultimately found petitioner deportable and recommended a denial of discretionary relief. On July 7, 1952, the Acting Commissioner of Immigration adopted the officer's findings and recommendation. Almost nine months later, on April 3, 1953, the Board of Immigration Appeals affirmed the decision of the hearing officer. A warrant of deportation was issued the same day and arrangements were made for actual deportation to take place on April 24, 1953.

The scene of action then shifted to the United States District Court for the Southern District of New York. One day before his scheduled deportation petitioner sued out a writ of habeas corpus. District Judge Noonan dismissed the writ on April 30 and his order, formally entered on May 5, was never appealed. Arrangements were then made for petitioner to depart on May 19.[3] However, on May 15, his wife commenced this action by

[3] Meanwhile, Accardi moved the Board of Immigration Appeals to reconsider his case. The motion was denied on May 8.

filing a petition for a second writ of habeas corpus.[4] New grounds were alleged, on information and belief, for attacking the administrative refusal to suspend deportation.[5] The principal ground is that on October 2, 1952—after the Acting Commissioner's decision in the case but before the decision of the Board of Immigration Appeals—the Attorney General announced at a press conference that he planned to deport certain "unsavory characters"; on or about that date the Attorney General prepared a confidential list of one hundred individuals, including petitioner, whose deportation he wished; the list was circulated by the Department of Justice among all employees in the Immigration Service and on the Board of Immigration Appeals; and that issuance of the list and related publicity amounted to public prejudgment by the Attorney General so that fair consideration of petitioner's case by the Board of Immigration Appeals was made impossible. Although an opposing affidavit submitted by government counsel denied "that the decision

[4] *Res judicata* does not apply to proceedings for habeas corpus. *Salinger* v. *Loisel*, 265 U. S. 224 (1924); *Wong Doo* v. *United States*, 265 U. S. 239 (1924).

[5] The first ground was that "in all similar cases the Board of Immigration Appeals has exercised favorable discretion and its refusal to do so herein constitutes an abuse of discretion." This is a wholly frivolous contention, adequately disposed of by the Court of Appeals. 206 F. 2d 897, 901. Another allegation charged "that the Department of Justice maintains a confidential file with respect to [Joseph Accardi]." But at no place does the petition elaborate on this charge, nor does the petition allege that discretionary relief was denied because of information contained in a confidential file. Although the petition does allege that "because of consideration of matters outside the record of his immigration hearing, discretionary relief has been denied," this allegation seems to refer to the "confidential list" discussed in the body of the opinion. Hence we assume that the charge of reliance on confidential information merely repeats the principal allegation that the Attorney General's prejudgment of Accardi's case by issuance of the "confidential list" caused the Board to deny discretionary relief.

was based on information outside of the record" and contended that the allegation of prejudgment was "frivolous," the same counsel repeated in a colloquy with the court a statement he had made at the first habeas corpus hearing—"that this man was on the Attorney General's proscribed list of alien deportees."

District Judge Clancy did not order a hearing on the allegations and summarily refused to issue a writ of habeas corpus. An appeal was taken to the Court of Appeals for the Second Circuit with the contention that the allegations required a hearing in the District Court and that the writ should have been issued if the allegations were proved. A majority of the Court of Appeals' panel thought the administrative record amply supported a refusal to suspend deportation; found nothing in the record to indicate that the administrative officials considered anything but that record in arriving at a decision in the case; and ruled that the assertion of mere "suspicion and belief" that extraneous matters were considered does not require a hearing. Judge Frank dissented.

The same questions presented to the Court of Appeals were raised in the petition for certiorari and are thus properly before us. The crucial question is whether the alleged conduct of the Attorney General deprived petitioner of any of the rights guaranteed him by the statute or by the regulations issued pursuant thereto.

Regulations[6] with the force and effect of law[7] supplement the bare bones of § 19 (c). The regulations

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[6] The applicable regulations in effect during most of this proceeding appear at 8 CFR Pts. 150 and 90 (1949) and 8 CFR Pts. 150, 151 and 90 (1951 Pocket Supp.). The corresponding sections in the 1952 revision of the regulations, promulgated pursuant to the Immigration and Nationality Act of 1952, may be found at 8 CFR Pts. 242–244 and 6 (Rev. 1952).

[7] See *Boske* v. *Comingore*, 177 U. S. 459 (1900); *United States ex rel. Bilokumsky* v. *Tod*, 263 U. S. 149, 155 (1923); *Bridges* v. *Wixon*, 326 U. S. 135, 150–156 (1945).

prescribe the procedures to be followed in processing an alien's application for suspension of deportation. Until the 1952 revision of the regulations, the procedure called for decisions at three separate administrative levels below the Attorney General—hearing officer, Commissioner, and the Board of Immigration Appeals. The Board is appointed by the Attorney General, serves at his pleasure, and operates under regulations providing that: "In considering and determining . . . appeals, the Board of Immigration Appeals shall exercise such discretion and power conferred upon the Attorney General by law as is appropriate and necessary for the disposition of the case. The decision of the Board . . . shall be final except in those cases reviewed by the Attorney General. . . ." 8 CFR § 90.3 (c) (1949). See 8 CFR § 6.1 (d)(1) (Rev. 1952). And the Board was required to refer to the Attorney General for review all cases which:

> "(a) The Attorney General directs the Board to refer to him.
>
> "(b) The chairman or a majority of the Board believes should be referred to the Attorney General for review of its decision.
>
> "(c) The Commissioner requests be referred to the Attorney General by the Board and it agrees." 8 CFR § 90.12 (1949). See 8 CFR § 6.1 (h)(1) (Rev. 1952).

The regulations just quoted pinpoint the decisive fact in this case: the Board was required, as it still is, to exercise its own judgment when considering appeals. The clear import of broad provisions for a final review by the Attorney General himself would be meaningless if the Board were not expected to render a decision in accord with its own collective belief. In unequivocal terms the regulations delegate to the Board discretionary authority as broad as the statute confers on the Attorney General;

the scope of the Attorney General's discretion became the yardstick of the Board's. And if the word "discretion" means anything in a statutory or administrative grant of power, it means that the recipient must exercise his authority according to his own understanding and conscience. This applies with equal force to the Board and the Attorney General. In short, as long as the regulations remain operative, the Attorney General denies himself the right to sidestep the Board or dictate its decision in any manner.

We think the petition for habeas corpus charges the Attorney General with precisely what the regulations forbid him to do: dictating the Board's decision. The petition alleges that the Attorney General included the name of petitioner in a confidential list of "unsavory characters" whom he wanted deported; public announcements clearly reveal that the Attorney General did not regard the listing as a mere preliminary to investigation and deportation; to the contrary, those listed were persons whom the Attorney General "planned to deport." And, it is alleged, this intention was made quite clear to the Board when the list was circulated among its members. In fact, the Assistant District Attorney characterized it as the "Attorney General's proscribed list of alien deportees." To be sure, the petition does not allege that the "Attorney General ordered the Board to deny discretionary relief to the listed aliens." It would be naive to expect such a heavy handed way of doing things. However, proof was offered and refused that the Commissioner of Immigration told previous counsel of petitioner, "We can't do a thing in your case because the Attorney General has his [petitioner's] name on that list of a hundred." We believe the allegations are quite sufficient where the body charged with the exercise of discretion is a nonstatutory board composed of subordinates within a department headed by the individual who formulated,

announced, and circulated such views of the pending proceeding.

It is important to emphasize that we are not here reviewing and reversing the *manner* in which discretion was exercised. If such were the case we would be discussing the evidence in the record supporting or undermining the alien's claim to discretionary relief. Rather, we object to the Board's alleged *failure to exercise* its own discretion, contrary to existing valid regulations.

If petitioner can prove the allegation he should receive a new hearing before the Board without the burden of previous proscription by the list. After the recall or cancellation of the list the Board must rule out any consideration thereof and in arriving at its decision exercise its own independent discretion, after a fair hearing, which is nothing more than what the regulations accord petitioner as a right.[8] Of course, he may be unable to prove his allegation before the District Court; but he is entitled to the opportunity to try. If successful, he may still fail to convince the Board or the Attorney General, in the exercise of their discretion, that he is entitled to suspension, but at least he will have been afforded that due process required by the regulations in such proceedings.

Reversed.

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[8] See the *Bilokumsky* and *Bridges* cases cited in note 7, *supra*.

SUPREME COURT OF THE UNITED STATES

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[March 15, 1954.]

Mr. Justice Jackson, whom Mr. Justice Reed, Mr. Justice Burton, and Mr. Justice Minton join, dissenting.

We feel constrained to dissent from the legal doctrine being announced. The doctrine seems proof of the adage that hard cases make bad law.

Peculiarities which distinguish this administrative decision from others we have held judicially reviewable must be borne in mind. The hearings questioned here as to their fairness were not hearings on which an order of deportation was based and which, under some limitations, may be tested by habeas corpus. *Ekiu* v. *United States*, 142 U. S. 651. Neither is this a case involving questioned personal status, as whether one is eligible for citizenship, which we have held reviewable under procedures for declaratory judgment and injunction. *McGrath* v. *Kristensen*, 340 U. S. 162. Petitioner admittedly is in this country illegally and does not question his deportability or the validity of the order to deport him. The hearings in question relate only to whether carrying out an entirely legal deportation order is to be suspended.

Congress vested in the Attorney General, and in him alone, discretion as to whether to suspend deportation under certain circumstances. We think a refusal to exercise that discretion is not reviewable on habeas corpus, first, because the nature of the power and discretion vested in the Attorney General is analagous to the power of pardon or commutation of a sentence, which we trust no one thinks is subject to judicial control; and second, because no legal right exists in petitioner by virtue of constitution, statute or common law to have a lawful order of deportation suspended. Even if petitioner proves himself eligible for suspension, that gives him no right to it as a matter of law but merely establishes a condition precedent to exercise of discretion by the Attorney General. Habeas corpus is to enforce legal rights, not to transfer to the courts control of executive discretion.

The ground for judicial interference here seems to be that the Board of Immigration Appeals did find, or may have found, against suspension on instructions from the Attorney General. Even so, this Board is neither a judicial body nor an independent agency. It is created by the Attorney General as part of his office, he names its members, and they are responsible only to him. It operates under his supervision and direction, and its every decision is subject to his unlimited review and revision. The refusal to suspend deportation, no matter which subordinate officer actually makes it, is in law the Attorney General's decision. We do not think its validity can be impeached by showing that he overinfluenced members of his own staff whose opinion in any event would be only advisory.

The Court appears to be of the belief that habeas corpus will issue to review a decision by the Board. It is treating the Attorney General's regulations as if they vested in the Board final authority to exercise his discre-

tion. But, in our view, the statute neither contemplates nor tolerates a redelegation of his discretion by the Attorney General so as to make the decision of the Board, even if left standing by him, final in the sense of being subject to judicial review as the Board's own decision. Even the Attorney General was not entrusted with this discretion free of all congressional control, for Congress specifically reserved to itself power to overrule his acts of grace. 54 Stat. 672, 8 U. S. C. (1946) § 155 (c), as amended, 8 U. S. C. (Supp. V) § 155 (c). It overtaxes our naïveté about politics to believe Congress would entrust the power to a board which is not the creature of Congress and whose members are not subject to Senate confirmation.

Cases challenging deportation orders, such as *Bridges* v. *Wixon*, 326 U. S. 135, whatever their merits or demerits, have no application here. In cases where the question is the validity of a deportation order, habeas corpus will issue at least to review jurisdictional questions. In those cases, also, the petitioner has a legal right to assert, *viz.*, a private right not to be deported except upon grounds prescribed by Congress. Neither the validity of deportation nor a private right is involved here.

Of course, it may be thought that it would be better government if even executive acts of grace were subject to judicial review. But the process of the Court seems adapted only to the determination of legal rights, and here the decision is thrusting upon the courts the task of reviewing a discretionary and purely executive function. Habeas corpus, like the currency, can be debased by overissue quite as certainly as by too niggardly use. We would affirm and leave the responsibility for suspension or execution of this deportation squarely on the Attorney General, where Congress has put it.